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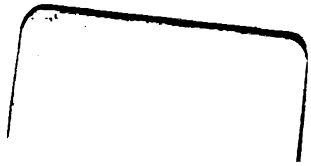

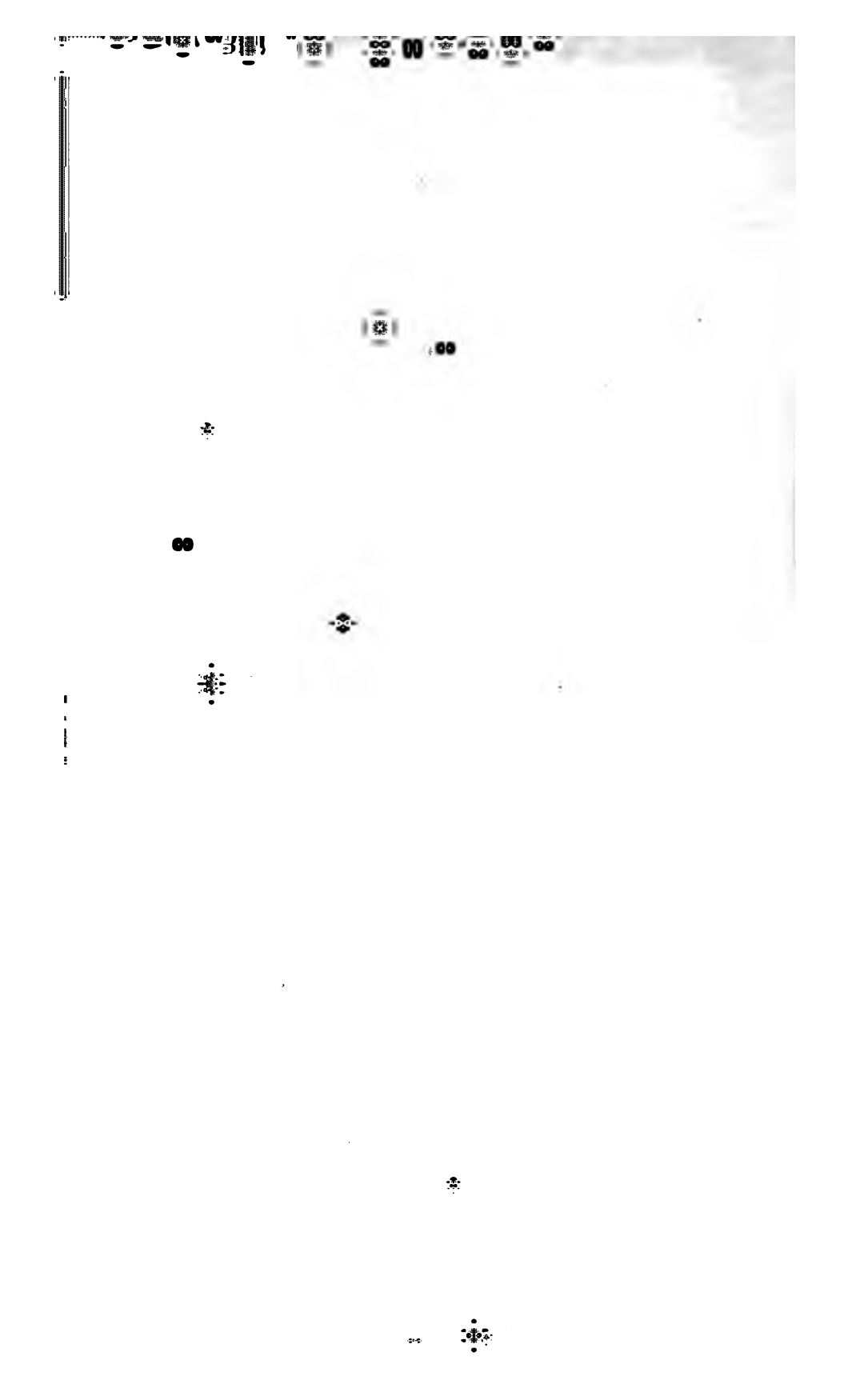

CASES

ARGUED AND DETERMINED

IN THE

CIRCUIT AND DISTRICT COURTS

OF THE

UNITED STATES,

FOR THE

SEVENTH JUDICIAL CIRCUIT.

BY

JOSIAH H. BISSELL,
OF THE CHICAGO BAR,
OFFICIAL REPORTER.

VOL. II.—1867-1871.

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JUDGES,

WHOSE OPINIONS ARE REPORTED IN THIS VOLUME.

HON. DAVID DAVIS,
ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES.
Allotted to the Seventh Circuit. Appointed December 8, 1862.

HON. THOMAS DRUMMOND,
CIRCUIT JUDGE FOR THE SEVENTH CIRCUIT.
Appointed December 22, 1869. District Judge since February 19, 1850.

HON. ANDREW G. MILLER,
DISTRICT JUDGE FOR THE EASTERN DISTRICT OF WISCONSIN.
Appointed June 12, 1848.

HON. SAMUEL H. TREAT,
DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF ILLINOIS.
Appointed March 3, 1855.

HON. DAVID McDONALD,
DISTRICT JUDGE FOR THE DISTRICT OF INDIANA.
Appointed December 13, 1864; Deceased August 25, 1869.

HON. WALTER Q. GRESHAM,
DISTRICT JUDGE FOR THE DISTRICT OF INDIANA.
Appointed December 21, 1869.

HON. HENRY W. BLODGETT,
DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF ILLINOIS.
Appointed January 11, 1870.

HON. JAMES C. HOPKINS,
DISTRICT JUDGE FOR THE WESTERN DISTRICT OF WISCONSIN.
Appointed July 9, 1870.

92035

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CASES

ARGUED AND DETERMINED

IN THE

CIRCUIT AND DISTRICT COURTS

OF THE

UNITED STATES.

SEVENTH JUDICIAL CIRCUIT.

GOODYEAR, Adm'r., &c. vs. HONSINGER.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—MARCH TERM, 1867.

IN EQUITY.

1. PRIOR ADJUDICATION. When there has been a prior adjudication in another court, in which the validity of a patent has been fully contested and sustained, the court will, upon a motion for a preliminary injunction, consider the validity of the patent as *prima facie* established.

2. DIVIDING PATENT. Whether a patent for a process can be re-issued and divided into two patents, one for the process, and the other for the product produced by the process, *quære*.

3. It is always unfair to those who are licensed to use the particular article or method, under letters patent, to allow, by laches, others to use what the licensees alone have a right to use under their licenses.

Goodyear vs. Honsinger.

4. INJUNCTION NOT ALWAYS GRANTED ON VALID PATENT. A court of equity, while it may be satisfied the patent is valid, does not feel inclined, where those claiming under the patent have been negligent in enforcing their rights, to interfere in all cases, by an absolute peremptory injunction.

5. EFFECT OF ACTS OF ORIGINAL PATENTEE. Those who hold under an extension, are to be visited with the consequences of the acts of the owners of the original patent. They take the extension as it falls to them on the expiration of the patent, and are not to be reinstated in all the rights of the original patentee.

6. SHOULD ASSERT HIS RIGHTS. Where a patentee has stood by for a series of years, and permitted, or not formally objected to the use of the article claimed under the letters patent, such conduct ought to be visited to some extent upon him. Courts of equity ought to demand of patentees reasonable diligence in asserting their rights.

This was a motion for a provisional injunction, to restrain defendant from infringing letters patent for an "improvement in the manufacture of India rubber," granted to Nelson Goodyear May 6, 1851, re-issued to Henry B. Goodyear, administrator of Nelson Goodyear, deceased, May 18, 1858, in two divisions, and extended to Henry B. Goodyear, for seven years from May 6, 1865.

On July 17, 1866, so much of the invention as applied to dental purposes, was assigned to Samuel A. Duncan.

The claims of the original patent were as follows:

"What I do claim, etc., is the combining of India rubber and sulphur, either with or without shellac, for making a hard and inflexible substance hitherto unknown, substantially as herein set forth.

"I also claim the combining of India rubber, sulphur, and magnesia or lime, or a carbonate or a sulphate of magnesia or of lime, either with or without shellac, for making a hard and inflexible substance hitherto unknown, substantially as herein set forth."

The disclaimer and claim of Re-issue 556 was as follows:

"It is well known that it has been proposed to produce a hard substance from caoutchouc, by passing it through highly heated liquid sulphur, but this has not been attended with practical success.

"I do not wish to be understood, however, as making claim broadly to the union of caoutchouc and sulphur in the proportions named, however these substances may be united and treated.

"But what I do claim as the invention of the said Nelson Goodyear, and desire to secure by letters patent, is the combining of sulphur and India

rubber, or other vulcanizable gum, in proportions substantially as specified, according to the vulcanizing process of Charles Goodyear, for the purpose of producing a substance or manufacture possessing the properties or qualities substantially as described; and this I claim, whether the said compound of sulphur and gum be or be not mixed with other ingredients, as set forth.

The disclaimer and claim of Re-issue 557, was as follows:

"I do not wish to be understood as making claim broadly to a manufacture or substance produced by the admixture of caoutchouc and sulphur, nor as making claim broadly to a manufacture or substance by subjecting the compound of caoutchouc and sulphur, whether with or without other substances, to a high degree of heat, as, prior to the invention of Nelson Goodyear, caoutchouc and sulphur had been compounded, and such compound alone, as well as other ingredients, had been subjected to a high degree of heat, but not to produce the manufacture or substance having the character peculiar to the said manufacture or substance invented by the said Nelson Goodyear.

"What is claimed, etc., is the new manufacture or substance herein above described, and possessing the substantial properties herein described, and composed of India rubber, or other vulcanizable gum, and sulphur, in the proportions substantially as described, and when incorporated, subjected to a high degree of heat, as set forth, and this I claim, whether other ingredients be or be not used in the preparation of the said manufacture, as herein described."

A. Pollock, *S. A. Goodwin*, and *F. H. B. Latrobe* for complainants.

S. S. Fisher, for defendant.

Drummond, J. In 1844 Charles Goodyear obtained a patent from the United States for a new discovery, which he claimed he had made by combining caoutchouc with sulphur in certain proportions, which letters patent were surrendered in 1849, and a re-issue was made by the Government upon the original letters patent.

The product thus described by Charles Goodyear in his letters patent and re-issue, was, as is well known, somewhat pliable in its character, not hard or stiff. In 1851 Nelson Goodyear claimed that he had made an improvement upon the invention of Charles Goodyear, and letters patent were issued to him on the sixth of May.

The discovery which he claimed he had made was, that by

combining in certain proportions sulphur and caoutchouc, a hard substance was produced, somewhat in the nature of horn or ivory, susceptible of a polish. This was called hard rubber, or, in consequence of the heat that was applied to it, "a high degree of artificial heat," as he terms it in his specifications, vulcanite. Nelson Goodyear died July 10, 1852; and it being claimed by his representatives that there was an error or mistake in the letters patent and the specifications as they were issued in May, 1851, application was made for a re-issue, and accordingly, on May 18, 1858, a re-issue was made to the administrator of Nelson Goodyear, consisting of two patents, numbered 556 and 557. These patents were issued, the one for the "method," as it is called, of producing the result claimed by Nelson Goodyear in his letters patent and specifications of May, 1851; the other was for the product. The patent would run, (the re-issue, as a matter of course, claiming nothing more than was claimed in the original patent,) from 1851 to 1865.

The patent then expiring, application was made under the law in force to the Commissioner of Patents for the extension of the patent, and accordingly, May 6, 1865, an extension was granted to the administrator of Nelson Goodyear, who thus becomes a party to this suit; and on July 17, 1866, an assignment was made to Samuel A. Duncan of the right under the patent and re-issue, so far as the invention was to be applied to dental uses. The two complainants now file their bill against Dr. Honsinger, a dentist of this city, claiming that he has violated the invention secured by the original letters patent, re-issue and extension.

I stated, during the progress of the argument, that on this motion I should consider it as *prima facie* established that the patent was valid. In 1862 a decree was rendered by Mr. Justice Nelson, Judge Smalley, of the District Court, sitting with him, upon this extension and re-issue granted in 1858. That suit was very closely contested, and the patents thoroughly considered by the court; and a decree was

rendered, establishing the validity of the patents, and of the rights under the re-issue.

The only criticism I feel inclined to make upon the re-issue in 1858 is as to the manner in which it was made—consisting of two letters patent, and two distinct specifications and claims —one for the "method" by which the product is obtained, and the other for the product itself. It has occurred to me as a question, whether the two things claimed are not essentially the same in their nature. The invention was a certain product, obtained in a particular way; and the claim, as set forth in one of the specifications, is "the combining of sulphur and India rubber, or other vulcanizable gum, in proportions substantially as specified, when the same is subjected to a high degree of heat, substantially as specified, according to the vulcanizing process of Charles Goodyear, for the purpose of producing a substance or manufacture possessing the properties and qualities substantially as described, and this, whether the compound of sulphur or gum be or be not mixed with other ingredients, as set forth;" in the other--where the mere product is claimed—the claim is set forth in this language: "The new manufacture or substance herein above described, and possessing the substantial properties described, and composed of India rubber or other vulcanizable gum and sulphur in the proportions substantially such as described, and, when incorporated, subjected to a high degree of heat, as set forth, and this whether other ingredients be or be not used in the preparation of the said manufacture herein described."

Now I am inclined to think that the patent is only valid for the particular method described, by which the result is produced. The product, obtained in the manner described, is the invention, and for that letters patent might issue—whether or not this product by possibility could be produced by the compounding of other materials, is a question that it is not necessary to discuss at this time. I shall consider the letters patent as valid, Judge Nelson and Judge Smalley having adjudicated upon their validity.

Then, as to the infringement by the defendant;—it is true that some affidavits have been filed by him, one particularly, in which he claimed that he did not admit to a witness, whose affidavit is on file, that he had violated the patents of the plaintiffs. But I do not understand him to deny that he has used for dental purposes, the product which the complainants claim, in the manner set forth under the letters patent.

I understand that it is stated in the specifications that there may be certain coloring matter introduced into the material from which hard rubber or vulcanite is to be created, and so whatever either experience or skill might suggest in relation to that coloring matter, could be added ; and as the idea is distinctly set forth in the specifications, it could be easily varied by any one according to his fancy. The leading idea is there, and if some other coloring matter is used, which is not specifically set forth in the letters patent, I think that would not affect the validity of the patents themselves.

Therefore I also take it for granted under the affidavits, that the defendant has used what is claimed under the letters patent, and so has infringed.

The only difficulty I have had in the examination of the case, and which I may say I had during the progress of the argument, was and is in consequence of what has taken place since the re-issue in 1858.

What are the facts in relation to that? The American Hard Rubber Company became possessed of the rights, the original patent and re-issue, so long as they might exist under the original patents, that is to say, until 1865. Under these rights they manufactured the hard rubber or vulcanite. They also prepared what is called "a plastic compound" which could be vulcanized at the will of the dentist, or of any one else who understood the mode of creating vulcanite. It was colored, and prepared in every respect for the dentists, and all they had to do was simply to apply the artificial heat to make it vulcanite, or hard rubber—such a material as to enable them to use it for their special purpose—a plate for artificial teeth or otherwise.

There is no doubt that the claim to this product, vulcanite, was always set up by the representatives of Nelson Goodyear, and that they denied the right of the dentists to use it for their special purpose, without the consent of the patentee, or his representatives.

This claim was set forth by publication, by application to the dentists to obtain licenses, and in other forms. It, however, was not acquiesced in by the dental profession. The affidavits filed in this case show that in 1855, possibly in 1854, this material first began to be applied to dental purposes, and in three or four years it came into general use, both by those who had licenses and those who had not.

The American Hard Rubber Company about this time, began to manufacture this plastic compound, colored, for the special use of the dentists, and it was sold by their agents from that time until the expiration of the patent.

It is set forth in the bill (and such is the statement of Ropes in his affidavit) that in all instances this preparation thus made by the American Hard Rubber Company, was labelled in a way to indicate to the public that it could be used and manufactured into vulcanite by those dentists only who had licenses under the patent; and if the case had stood here, alone, unaffected by anything that occurred afterward, I should have reached a different conclusion on the application, from that at which I have arrived from other facts in the case, to which I will now advert.

Notwithstanding the issuing of the licenses under the patent to the number of two thousand, as is said in the bill, and the manufacture of this plastic compound by the American Hard Rubber Company, with the labels on the parcels thus manufactured, it is undoubtedly true that a large number of the dentists of the United States declined to accept such licenses, or pay for them under the patent.

It is also true, that, notwithstanding the prohibiton contained upon the label of the article as manufactured, the agents of the American Hard Rubber Company did know-

ingly sell it to dentists who had no licenses. The reason why this was permitted, and the way in which the effect of those sales is sought to be avoided, is thus set forth in the bill, "The great expense of prosecuting infringements in the different parts of the United States, in some of which the recovery would not equal the unavoidable expenses of the suits not taxable as costs, and the near approach of the expiration of the term for which said letters patent were originally granted, at which time the operations of the said American Hard Rubber Company in the West would cease by limitation, deterred the American Hard Rubber Company, who were to bear the whole expense of the litigation, from prosecuting any more suits."

It was unfair, and is always unfair, to those who are licensed to use the particular article or method, under letters patent, to allow others to use what the licensees have thus purchased. It is true that this conduct may be explained. There may be circumstances such as would not warrant any inference against the patentee, from such conduct; as, for instance, if the patentee were unable to prosecute the parties thus infringing the patents; or, if circumstances were such as to indicate that there was no acquiescence, expressed or implied, in the violation; or, as appears in this case, that there was a suit pending in one of the circuit courts of the United States, where the right under the patent was to be tested. That would constitute a reason why the patentee, or those claiming under him, should not involve themselves in great expense while there might be a question as to the validity of the patent. So far as it goes, that is a sufficient justification for the parties claiming under this patent. But it does not go the full extent to which I think the patentee ought to go when he comes into court and asks for the summary remedy of injunction, without qualification, and without condition. I am constrained to believe that in this case the representatives of the patentee had the ability to prosecute those who infringed their rights under the patent, and that it was, to some extent, a voluntary acquiescence in a fact which was notorious, and which the affidavits show must have been known to the patentees or their

representatives—that this article was sold in the market—was being purchased by dentists from time to time for a series of years, and was being used by them for their own special purposes. Under such circumstances, a court of equity, while it may be satisfied that the patent is valid, does not feel inclined, to interfere, in all cases, by an absolute peremptory injunction, without condition or qualification.

I take it that these complainants, although they claim under the extension, are to be visited with the consequences of the acts of their predecessors, the American Hard Rubber Company. They take the extension just as it fell to them on the expiration of the patent from the successors of those claiming under the original patent and the re-issue, and, of course, are not to be reinstated in all the original rights of the patentees, in every respect, as they stood when the original letters patent were issued, or the re-issues were given.

But, as I said during the argument, I desire to protect the rights of all the parties; I shall, therefore, in this case make a special order. I am satisfied of the validity of the letters patent and the re-issues, and have no doubt that the defendant has infringed. I shall accordingly issue an injunction against the defendant, with leave to him, at a future time, to come in and have the injunction dissolved, upon giving adequate security to the complainants.

It has been said that, to some extent, the granting such an order as this, on such a condition, is to deprive the complainants of their rights under the letters patent; that there is nothing so potent as a peremptory writ of injunction, without qualification or condition. There can be no doubt of that. It suspends at once, so far as the mandate of the court can do it, all acts of use under the letters patent, by any one, except with the consent of the patentee or his representatives. But when the patentee has stood by for a series of years, and permitted, or not objected in the way in which the law authorizes him to object, to the use of the article claimed under the letters patent, I think that such conduct ought to be visited, to some extent, upon the patentee.

The unconditional injunction of the court places the dentists in the power of the patentees. A conditional injunction of the court, allowing it to be dissolved on giving security, it may be said, places the patentee in the power of the dentists; and yet, to some extent, the same consequences follow—for example, an absolute, unconditional injunction can only operate *in terrorem* over other parties using the article without the consent of the patentee, by compelling them to take out licenses. After injunction is granted unconditionally, the patentee can go to all who use the vulcanite, and say to them: "You must take out a license, or I will file a bill and have an injunction issued against you, as I have already against your brother dentist." But so it is in the other case. The patentee can go to the dentists who use this article without permission, and say to them: "I will file a bill against you, and will compel you to give security, as I have already compelled your brother dentist."

I admit that the one aspect of the case is more potential for the rights of the patentee, than the other. But from what I have already said, it will be seen that I visit, to some extent, upon the patentee the consequences of his own *laches*.

This was the view I took, a short time since, on full consideration of a case growing out of a patent to parts of the sewing machine. I think that courts of equity ought to demand of patentees reasonable diligence in asserting their rights. Of course, the rule is flexible, subject to be changed by the peculiar circumstances of each case. A court of equity should always act fairly and justly, so as to protect the rights of patentees, although they may not, owing to various circumstances, prosecute their rights so soon or so early as, under other circumstances, they ought to do.

Now I take this course, for this reason. The view that I take of the rights of the complainants and the defendant will be understood on both sides. There is a litigation now pending, in which the rights of the patentee will be fully ascertained. The only change, as asserted by the present litigation, from what was claimed in the former—the one terminated in 1862,

by Judge Nelson and Judge Smalley— is, I suppose, in the application of this particular material to dental purposes. As I understand, that question was not distinctly in issue in that case.

I shall give the complainants a peremptory writ of injunction now, allowing the defendant to move to dissolve it at a future time to induce the other dentists, who are not parties to this suit to make some satisfactory arrangements with the patentees. I should feel very much inclined, if the dentists should prove recusant, refractory, or unreasonable, to grant hereafter, on application, a peremptory writ of injunction, without condition or qualification.

What I want to do is, to protect the rights of the complainants and the rights of the defendant and of the public.

The order of the court will be, that the injunction issue against the defendant, with leave to him, within ten days, to come in, and, on notice, move to dissolve the injunction upon giving adequate security to the complainants. I do not want to compel these dentists actually to pay anything now to these patentees for licenses, but to give adequate security to do so. If the patentees are not willing to take the personal obligation of the dentists, I want them to be compelled to give security satisfactory to the parties to pay them in case these patents are sustained by the appellate court, or whenever the litigation may be terminated. I have dictated the order in this form, because I did not wish to compel the complainants to file other bills, and prosecute other litigation.

READ vs. MILLER.

CIRCUIT COURT.—DISTRICT OF INDIANA.—NOVEMBER, 1867.

1. STATE LIMITATION.—To an action on the case for the infringement of a patent, no state statute of limitation can be pleaded in bar.

2. PLEADINGS.—Nor can the defendant plead the general issue with notice of special matters of defense, and also in a special plea set up the same matter in bar.

3. UNIFORMITY OF RULE IN PATENT CASES.—The policy of the National Government in putting the whole subject matter of patents under the control of Congress and the United States Courts, was evidently to provide a uniform rule concerning the same throughout the United States, that patentees might everywhere have the same rights and remedies.

This was a demurrer to special pleas in an action on the case for the infringement of letters patent for "an improvement in harvesters," granted to Jonathan Read, April 12, 1842, and extended for seven years from April 12, 1856. Suit was brought in the spring of 1867 to recover damages which had accrued from the infringement of the patent during its lifetime. The defendants pleaded the statutes of Indiana and Kentucky, the defendants having resided in Kentucky when manufacturing the infringing machines and in Indiana when the suit was brought. To these pleas the plaintiffs demurred, and moved, at the same time, to strike out the fourth special plea filed by defendants, on the ground that the same matters were set up in the special notice under section fifteen of the act of July 4, 1836, which accompanied the plea of the general issue. The motion and demurrer were argued together.

Porter, Harrison & Fishback and *S. S. Fisher*, for plaintiffs.

G. M. Lee, for defendants.

Read vs. Miller.

McDonald, J. This is an action on the case for the violation of a patent right. The defendants have pleaded four pleas:

1. The general issue with notice of special defense.

2. A plea of the statute of limitations of the State of Kentucky, averring that the supposed cause of action accrued in that state, then the place of residence of the defendants, more than five years next before the commencement of this suit.

3. A plea of the statute of limitations of the State of Indiana, denying that the cause of action accrued within six years next before the bringing of this action.

4. A special plea, denying the novelty of the invention in question.

To the second and third pleas the plaintiffs demur.

Counsel for defendants seem to admit in their brief that the plea of the statute of limitations of Kentucky is not a bar to the action, though the Indiana Code of Procedure, section 216, provides that "when a cause has been fully barred by the laws of the place where the defendant resided, such bar shall be the same defense here as though it had arisen within this state."[1] It appears to me, therefore, that this plea is as good as the plea of the statute of limitations of the State of Indiana.

But the plaintiffs' counsel argue that no statute of limitations enacted by any state can be pleaded in bar of this action. And this is the only point worthy of consideration on the demurrer to the pleas.

It is certain, as a general rule, that the laws of a state in which a national court sits must be the rules of decision in such court. This general rule is founded on section 34 of the Judiciary Act, which provides that "the laws of the several states, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States in cases where they apply."[2]

[1] Riser vs. Snoddy, 7 Indiana, 442.

[2] 1 U. S. Statutes at Large, 92.

It is too well settled to require the citation of authorities, that, in ordinary actions at law in the United States courts, the statutes of limitation of the state where the suit is brought may be pleaded under this provision of the Judiciary Act. And it is equally well settled that this provision only embraces property laws and laws concerning personal rights, and not mere forms of procedure.

Then, state statutes of limitation may, as a general rule, be pleaded to actions pending in the national courts.

But must we not deem the action in question to form an exception to this general rule? The general rule undoubtedly embraces most actions over the subject matter of which the state and national courts have concurrent jurisdiction. But does it embrace also those actions the subject matter of which is under the exclusive control of the National Legislature and Judiciary?

The Constitution of the United States has given to the National Government exclusive control of the whole subject matter of patent rights for new and useful inventions. No state, therefore, can pass any valid law concerning them. It is not any state law, nor even the common law, that authorizes the action under consideration. It is given by the Act of Congress of July 4, 1836. And this act, as I construe it, gives the United States circuit courts exclusive jurisdiction over the whole subject-matter. No state court can adjudicate upon the question of a violation of a patent right. Questions, touching these rights may incidentally arise in the state courts, and be decided by them. But, I repeat, no state court can try a case like the one now under consideration.

The policy of the National Government in thus putting the whole subject-matter for new and useful improvements and inventions under the control of Congress and the United States courts evidently was to provide a uniform rule concerning the same throughout the United States, so that patentees shall everywhere have the same rights and the same remedies. And this is eminently proper, for the whole subject is one not of

local but of national concern. But no such policy is deducible from section 34 of the Judiciary Act. Indeed that section plainly indicates a contrary policy, for in regard to the matters which it embraces it destroys the uniformity of the rules of decision in the national courts, and requires them to conform to the laws of the respective states, however various and contradictory those laws may be.

Since, then, no state has any power to legislate concerning patent rights, and no state court has jurisdiction to adjudicate concerning a violation of them, it can hardly be supposed that a state may, nevertheless, pass statutes of limitation concerning them which shall control national courts concerning their infringement. It ought not to be presumed that the state legislature, in passing a statute of limitations, ever intended it to extend to patent right litigations, since such litigation cannot arise in a state court. Nor ought the presumption to be indulged that section 34 of the Judiciary Act could have been intended to authorize state legislatures to pass statutes of limitation on subjects over which the states have no control. Moreover, it should be noted that section 34 of the Judiciary Act only makes the laws of the several states rules of decision in the national courts "in cases where they apply." Now it appears to me that these state laws do not apply in cases over which the state governments have no control whatever, and which are under the exclusive control of the General Government.

The counsel for the defendants seems to rely confidently on the case of *McCluny vs. Silliman*, 3 Peters, 270, as sustaining the pleas in question. But I think that case not in point. It was an action against Silliman, a land officer, for official misconduct. Over the subject matter of it I suppose the state and national courts had concurrent jurisdiction. If so, the case evidently fell within the provisions of section 34 of the Judiciary Act, and so it was decided by the Supreme Court. In that case, therefore, the plea of the statute of limitations of the State of Ohio was very properly held to be a good bar to the action.

Upon the whole I conclude that no state statute of limitations can bar this action. And I think that, should a state legislature pass an act in express terms limiting the action on the case for violating patent rights, a thing never yet, I believe, attempted by any state legislature, such an act would be unconstitutional and void.

The demurrer to the second and third pleas is sustained.

The plaintiffs move to strike out the fourth plea on the ground that it merely amounts to the general issue as accompanied with notice of special matter of defense.

At common law this plea would undoubtedly be bad as amounting to the general issue, for it is a mere denial of a material allegation in the declaration.

But section 15 of the patent law of 1836[1] appears to change this rule. It provides that in actions of this sort "the defendant in any such action shall be permitted to plead the general issue and to give this act, and any special matter in evidence, of which notice in writing may have been given to the plaintiff or his attorney thirty days before trial tending to prove * * * that the patentee was not the original and first inventor or discoverer of the thing patented." It seems that the special matter mentioned in this section cannot be given in evidence under the general issue, without notice, as might have been done at common law.

Under the act of 1793, containing a provision similar to that above cited, it has been held that the notice accompanying the general issue is "a substitute for a special plea to which the defendant is not obliged to resort," and that "he may still plead specially, and then the plea is the only notice which the plaintiff can claim."[2]

It is clear, therefore, that the defendants may specially plead that the plaintiffs were not the original inventors of the thing patented as alleged in the declaration. But the question is, may they both plead the general issue with notice of special matter

[1] 5 U. S. Statutes at large, 123.

[2] Evans vs. Eaton, 8 Wheaton, 454.

of defense, and a special plea containing exactly the same special matter of defense. If the matter of defense stated in the plea were different from that contained in the notice, I think the special plea might be added. But here the matter is the same in both.

Although, in general, every defendant may file as many pleas as he thinks proper, yet he is not permitted to file several pleas substantially identical. If he does so he must either elect on which one he will rely, and abandon the rest, or the court will strike out all of them but one.

We have seen that the notice of special matter of defense under the general issue is "a substitute for a special plea." It must be deemed, therefore, equivalent to a special plea. The defendants, then, have on file what are virtually two special pleas, exactly alike as to matter of special defense. The second one cannot benefit them, and it can only serve to cumber the record. The fourth plea must, therefore, be stricken from the files.

THE TUG UNION.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—JUNE 1868.

IN ADMIRALTY.

REMOTE DAMAGES.

1. The libellant had left his tug and taken refuge in another at the time of a collision, and was injured in regaining his tug: *Held*.—The collision was the remote, not the proximate cause of the injuries to libellant, and he cannot recover.

This was a libel filed by Peter Nolan, one of the crew of the tug Dole, for damages caused by the crushing of his leg at the time of a contact between the tugs Dole and Union, he claiming that it was on account of the negligence of the latter tug.

The facts appear in the opinion.

Bates & Towsley, for libellant.

Waite & Clarke for respondent cited in support of the position that the damages were too remote to be recovered: *Pearson vs. Duane*, 4 Wallace, 605; *Insurance Co. vs. Tweed*, 7 do 50; *Milton vs. Hudson River Steamboat Co.*, 37 New York, 210; *Miller vs. Mariners' Church*, 7 Greenleaf, 51; *Shannon vs. Comstock*, 21 Wendell 457; *Clark vs. Marsiglia*, 1 Denio, 317; *Spencer vs. Halstead*, Id. 606; *Loker vs. Damon*, 17 Pickering, 284; *Ryan vs. New York Central R. R. Co.*, 35 New York, 210; *Waite vs. Gilbert*, 10 Cushing, 177; Hilliard on Torts, 424; *Denny vs. New York Central R. R.*, 13 Gray, 484.

The Tug Union.

DRUMMOND, J. The tugs Union and Dole collided outside of Chicago harbor, May 28, 1867, no special damage being done, but several of the men on the Dole, the master and libellant among the rest, fearing that she would fill and sink, left her and took refuge on the Union. The tugs shortly afterward separated. The Dole soon righted, and those of her crew on board the Union wished to return. The Union then approached the Dole to put them on board, and after two efforts all were put on board except libellant. He was sitting upon the rail with his legs hanging over the side, and when the tugs came in contact one of his legs was crushed.

This being so, the question arises, whether the fault, if fault there was in the Union, in the first instance was the proximate cause of the injury to the libellant. Admitting that there was fault on the part of the Union, and that the collision was the result of that fault, was he injured by that collision in such a way as to entitle him to damages? I think he was not.

It is true, as is argued by the counsel, that if the tugs had not come together in the way that they did, if these men had not been frightened as they were and taken refuge on board of the Union, the result would not have happened. In that sense the collision was the cause of the injury, but in the sense of the law I think it was the remote cause; the remote, and not the proximate cause of the injury. The proximate cause of the injury was the two tugs coming together afterwards, and the libellant putting his legs over the rail of the Union in the effort to return on board of the Dole. It was this last contact, not claimed to be a fault on the part of the Union, together with the position of the libellant, that were the proximate causes of the injury to the libellant, and therefore, without deciding whether in point of fact, under the evidence, the Union was in fault or not, I think that the libellant cannot recover.

The libel will therefore be dismissed.

BRADSHAW, Assignee, &c., vs. KLEIN.

DISTRICT COURT.—DISTRICT OF INDIANA.—MAY TERM, 1868.

IN BANKRUPTCY.

FRAUDULENT CONVEYANCE BY BANKRUPT.

1. An assignee in bankruptcy can maintain an action to recover property conveyed by the bankrupt with intent to defraud his creditors previous to the filing of the petition; in such case he represents the rights of the creditors.

2. Such action is not limited by the provisions of the 35th section, but only by the general statute of limitations.

This was a bill in chancery filed by William A. Bradshaw, assignee of Armstead M. Klein, a bankrupt, against Henry Klein and others.

The bill charges that the bankrupt, before the passage of the Bankrupt Act, transferred certain property to one John A. Klein, without consideration, for the purpose of defrauding the bankrupt's creditors: that said John A. Klein, without consideration, transferred the same to the defendants, who now claim title thereto; and that the bankrupt has ever retained and now retains possession of said property. And it prays that the property be made assets in the assignee's hands for the benefit of the bankrupt's creditors.

Defendants filed a general demurrer.

Mr. Ritter, for complainant.

Mr. March, for defendants.

MCDONALD, J. The only question made in support of the demurrer is this: Can the assignee of a bankrupt maintain an action to recover property conveyed by the bankrupt with intent to defraud his creditors?

In support of the demurrer, it is argued that the assignee takes such right of action only as the debtor had before he we

adjudged a bankrupt; and that as he could not have sued before the adjudication to recover property conveyed by him in fraud of his creditors, so his assignee cannot, afterwards, maintain such action.

There can be no doubt that a transfer of property made with intent to defraud creditors, is valid as between the parties to it, and that the seller, having delivered over the possession of the property, cannot recover its possession. To such a case the maxim applies, that *in pari delicto potior est conditio possidentis.* And it is true that the 14th section of the Bankrupt Act transfers to the assignee all the rights of property and of action previously held by the bankrupt. But does the assignee represent the rights of the bankrupt and his rights only? Does he not also represent the rights of the creditors?

It is very clear that, but for the adjudication of bankruptcy, the creditors might subject to the payment of their debts property conveyed by their debtor in fraud of their rights. But now, since he is adjudged a bankrupt, this right is taken away from them. The law will not allow them to sue at all for their debts. And if the assignee cannot maintain an action to have the fraudulent conveyance set aside, and the property subjected to the payment of debts due to creditors, there can be no remedy whatever in such a case. To so decide would altogether defeat the operation of the statutes against fraudulent conveyances in all cases of bankrupt debtors. For if the ground assumed in support of the demurrer be tenable, then a failing debtor may to-day transfer all his property with intent to defraud his creditors, and six months hence be adjudged a bankrupt, without any power in any person to reduce the property thus fraudulently conveyed, to assets for the payment of his debts. Courts ought to be very reluctant to indulge a doctrine fraught with such consequences. Under the Bankrupt Act of 1841, the Supreme Court of Mississippi has, indeed, held this doctrine. But I have no hesitation in pronouncing that decision erroneous. A very high authority, Judge Curtis, under the Act of 1841, decided differently. He held that "there

is a broad distinction between a bill by the bankrupt, the author of the fraud, and one by the assignee, who seeks to recover the property for the benefit of the very interest sought to be defrauded. The ground of refusing relief to the author of the fraud is a principle of public policy, which forbids the court to be auxiliary to a plan for evading the law, and depriving the creditors of their just and legal rights. But where the assignee sues, the case is reversed—to grant the relief is to act in accordance with these rights of creditors and in opposition to the contemplated fraud; while to refuse it would be to aid in its perpetration."[1]

If, as Judge Curtis held, under the act of 1841, the assignee might maintain an action to set aside a fraudulent conveyance made before that act was passed, the reason for allowing such an action, under the Bankrupt Act of 1867, is much stronger. The Act of 1841 merely provided, as the present Act provides, that the bankrupt's title to all his property should vest in his assignee, with the right to sue for the same.[2]

But the Bankrupt Act of 1867 goes a step further, and in the 14th section declares that "All the property conveyed by the bankrupt in fraud of his creditors * * * * shall, in virtue of the adjudication of bankruptcy and the appointment of his assignee, be at once vested in such assignee."

Counsel for the defendant insist, however, that the 35th section of the Act modifies the language of the 14th section above cited, and limits the right of action to set aside fraudulent conveyances to four or, at most, six months. But I cannot assent to this construction. I think the provision above cited from the 14th section relates to the state statutes against fraudulent conveyances, and to these only; and that the 35th section of the Bankrupt Act has no reference to those statutes, but is only intended to reach frauds on the Bankrupt Act. The two sections relate to different subjects; neither of them, therefore, can be construed as explaining, modifying, or limiting the operation of the other.

[1] *Carr vs. Hilton*, 1 Curtis, 238.
[2] 5 U. S. Statutes at Large, 442-3.

On the whole I conclude that an assignee in bankruptcy may maintain an action to set aside fraudulent conveyances made by the debtor before he is adjudged a bankrupt, and even before the Bankrupt Act was passed, provided the person to whom the transfer was made was a party to the fraudulent intent, or received the transfer without valuable consideration, and provided the action is not barred by the statute of limitations.

The demurrer is overruled.

Consult *Goodwin vs. Sharkey*, 3 Bankrupt Register, 188. *In re Gregg* 4 do., 150. *Allen, Assignee, &c. vs. Massey* Id., 75. *Davis, Assignee, &c. vs. Anderson*, 6 do., 145. *In re Metzger*, 2 Bankrupt Register 114. *Foster, Assignee, vs. Hackley*, Id. 131.—[*Reporter.*

THE LITTLE GIANT.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—JULY TERM, 1868.

IN ADMIRALTY.

1. A tug is in fault which, in a crowded thoroughfare, like the Chicago River, proceeds at the rate of over five miles an hour.

Appeal from decree of District Court in favor of James McNamara and others, owners of the schooner Lizzie Throop, and against the tugs Little Giant and Wm. L. Ewing, for damages caused by a collision in the Chicago River.

The facts appear in the opinion.

Reynolds & Phelps, for libellants.

Rae & Mitchell, for respondents.

The Little Giant.

DAVIS, J.—This is a case of collision on the Chicago River, and the question presented on appeal is, whether the Little Giant was in fault, as both tugs were condemned by the District Court and the Ewing did not appeal. The Little Giant was conveying up the river in daylight the schooner Lizzie Throop, and had passed through Rush street bridge, and in attempting to pass through the north draw of State street bridge, collided with the tug Ewing, and, in backing, injured the tow. The libel was filed against both tugs for this injury. The Little Giant was in fault, because the rate of speed at which she was proceeding, at least five miles an hour, some witnesses say six, was not careful navigation in a crowded thoroughfare like the Chicago River. If these officers had been mindful of their duty and proceeded slowly, the accident would not have occurred. It was reckless conduct on their part to take the north draw when a propeller was in the way, and if they had been watchful and careful they could have seen the Ewing coming down.

Although the evidence in this case is conflicting, as is usual in cases of the kind, on no theory which can properly be taken of it, can the Little Giant be freed from fault.

The decree of the District Court is affirmed with interest.

THE GRAY EAGLE.

CIRCUIT COURT.—EASTERN DISTRICT OF WISCONSIN.—SEPTEMBER, 1868.

IN ADMIRALTY.

1. VESSEL HAVING LOST HER SIGNAL LIGHTS—In a storm, and proceeding on her way with the prohibited white light, is not necessarily to be charged with all the damages in case of collision.

2. DUTY OF OTHER VESSELS.—The fact that she carried a light prohibited to vessels while sailing does not of itself absolve other vessels from the observance of that degree of caution, care and nautical skill which the exigencies of the case require.

3. Though a white light usually represents a vessel at anchor, the officers of an approaching vessel have no right to conclude that it always does.

4. MUST WATCH LIGHTS.—It was their duty, from the moment the light was seen, to watch it carefully in order to ascertain from its bearings whether the vessel was in motion; and if, in the exercise of ordinary nautical skill and care, this could have been done, and was omitted, and this omission contributed to the accident, then their vessel must share the loss, although the other vessel was in fault in running with a prohibited light.

5. A vessel is not under all circumstances required to come to anchor at night when, through misfortune she has lost her signal lights. In running, she is so far protected that every other vessel must be navigated with reasonable care, skill and caution.

This was an appeal from a decree of the District Court dismissing a libel filed by John Greening and Charles N. Deott, as owners of the schooner Perseverance, against the schooner Gray Eagle, for damages caused by a collision.

The facts are stated in the opinion.

Wm. P. Lynde, for libellants.

Emmons and Van Dyke for respondents, as to absence of lights cited *Waring et al vs. Clarke*, 5 Howard 465; *Barque Delaware vs. Osprey*, 2 Wallace, C. C. 275; *The Emperor*

vs. The Zephyr, Holt's Rule of the Road, 24; *The Pyrus vs. The Smalls*, Id. 40; *The Louisa vs. The City of Paris*, Id 22.

What will excuse departure from rule. *The Princessan Louisa vs. Artemas*, Holt's Rule of the Road, 78; *The Newcastle vs. Graff von Rechteren*, Id 247; *The Margeret vs. The Emma* Id 252; *The Planet vs. The Aura*, Id. 257; *The Concordia*, 1 Law Reports, Admiralty & Ecclesiastical, 93; *The Spring*, Id. 99.

That the Gray Eagle had used all the diligence required by law or good seamanship, *Strout vs. Foster*, 1 Howard 89; *Barque Delaware vs. Steamer Osprey*, 2 Wallace C. C. 274; *Peck vs. Sanderson*, 17 Howard 178; *The Columbus*, Abbott's Admiralty, R. 384; *The Grace Girdler* 7 Wallace 196-203. *The Nichols* Id. 656

That the fault did not originate on her part, and that the real responsibility was with the Perseverance. *The Genesee Chief* 12 Howard 443; *Fashion vs. Wards* 6 McLean, 152; *The Northern Indiana*, 3 Blatchford, 92; *Union S. Co. vs. New York & Vir. S. Co.*, 24 Howard, 307; *Ralston vs. The State Rights*, Crabbe, 22; *Ward vs. The M. Dousman*, 6 McLean, 231; *The Nichols*, 7 Wallace, 656.

DAVIS, J. The Schooner Perseverance sailed from Chicago on the 19th of November, 1864, with a cargo of wheat, bound for Ogdensburg. When in Lake Michigan, off the Manitou Islands, during a severe storm, she lost her signal lights, which she was unable to replace after making efforts to do so. Owing to the lateness of the season, the severity of the weather, and the extent of her voyage, being unwilling to incur the delay of lying by at night, she proceeded on her way, showing at night a white light, in order to call the attention of other vessels to her. While running through the Straits of Mackinaw, at two o'clock on the morning of the twenty-fourth of November, the schooner Gray Eagle, bound from Buffalo to Milwaukee, collided with her, and destroyed both vessel and cargo.

It is argued, that as the Perseverance was running without the regular lights, and with the prohibited white light, she

must be charged with all the damages, although the court should find that the Gray Eagle was also in fault. This position is untenable. It is unquestionably true that the rules of navigation, as prescribed by the Act of Congress, must be observed, "but in obeying and construing these rules due regard must be had to all dangers of navigation." The fact that the Perseverance had a light prohibited to vessels while sailing, did not of itself absolve the Gray Eagle from the observance of that degree of caution, care and nautical skill which the exigencies of the case required. If a white light *usually* represented a vessel at anchor, the officers and seamen of the Gray Eagle had no right to conclude that it *always* did. It was their duty, from the moment the light was seen, to have watched it carefully, in order to ascertain from its bearings whether the vessel was in motion or at anchor. And if, in the exercise of ordinary nautical skill and care, this could have been done, and was omitted, and this omission contributed to the accident, then the Gray Eagle must share the burden of the loss, although the Gray Eagle was in fault in running with a prohibited light. I cannot say that a vessel is under all circumstances required to come to anchor at night, if through misfortune she has lost her signal lights. There may be a state of case in which herself and cargo would be in more peril by delay at night than by pursuing a continuous voyage. It is true she encounters serious hazard by running at night, but she is so far protected that every other vessel occupying the same waters must be navigated with reasonable care, skill and caution.

The obligation of the Gray Eagle to use all reasonable precautions to avoid a collision was not varied because the Perseverance was running with a prohibited light. The present case is one of mutual fault, which, in my opinion, requires a division of damages. It is unnecessary to discuss the evidence at length, in order to show carelessness and fault on the part of the Gray Eagle. She is convicted of want of ordinary seamanship in her own statement of the collision.

The answer says, "A white light was seen about a mile

distant, which was supposed to be a light on shore or upon a vessel at anchor. The Gray Eagle was then kept away about a point and steadied in her course to give berth to the light. The light was not discovered to be a vessel's light in motion by the commanding officer until the Perseverance got within about three lengths of the vessel."

And why was this important discovery not sooner made? The night was not too dark to do it, for the evidence is that the sails of the Perseverance could readily have been seen a quarter of a mile off; and the wheelsman of the Gray Eagle (in not the best portion of the vessel to see the light), nevertheless, saw it twenty minutes before the collision.

If the light was discovered a mile off, is it not apparent that ordinary vigilance would have disclosed to those on board the Gray Eagle that it was on a vessel in motion, long before there was any danger of collision? The vessels could not have kept their respective courses without it being evident to a watchful seaman that the light was in motion. I cannot, for want of time, analyze the evidence, so as to show how the collision could have been avoided, if the light of the Perseverance had been properly watched. It is very clear the persons in charge of the Gray Eagle were so confident that the light was stationary, that they rested in security, and omitted the observations which good and prudent seamanship required to be made, and which, if made, could not have failed to have disclosed to them the character of the light, and enabled them to keep out of the way of the Perseverance. This conduct on the part of the Gray Eagle contributed very materially to the collision, and that vessel should share with the Perseverance the consequence of that disaster.

For opinion of the District Court in this case, see Volume 1 of this Series, p. 476. For opinion of the Supreme Court affirming the decision, see 9 Wallace 505. See also *The Scotia*, 14 Wallace, 170.

The Supreme Court have recently decided, that although a vessel may be sailing at night with other than the prescribed lights, and by thus actually misleading another vessel tend to cause a collision, yet this will not discharge the other vessel, if she by intelligent vigilance would have discovered from other indications that the vessel was not what her lights indicated. *The Continental*, 14 Wallace, 345.—[*Reporter*.

THE ALLEGHANY.

CIRCUIT COURT.—EASTERN DISTRICT OF WISCONSIN.—SEPTEMBER, 1868.

IN ADMIRALTY.

PROPELLER ENTERING HARBOR.

1. A propeller, entering a harbor, having accepted the signal of an approaching tug and tow to keep to starboard, should, if for any reason it cannot do so, slacken speed.
2. It is not the duty of the tug to stop, as her tow would then become unmanageable.
3. Six miles an hour is too high a rate of speed in Milwaukee harbor, when the vessel does not mind her helm.
4. Testimony of passengers commented upon.

This was an appeal from a decree of the District Court against the propeller Alleghany for the loss of a cargo of oats shipped by the libellant, Bernard Goldsmith, on board the schooner Henry C. Winslow, which was sunk by collision with the Alleghany.

The facts are fully stated in the case in the District Court, as reported in Volume 1 of this Series, p. 497.

Emmons & Van Dyke for libellant, cited *The Marcellus*, 1 Blatchford, 414; *The Water Witch*, Id, 494; *The Potomac*, 2 do., 581; *Newell vs. Norton*, 3 Wallace, 258; *The Grace Girdler*, 7 do., 196.

E. Mariner for respondent.

DAVIS, J. This case was at the last term argued with great ability and earnestness, but for want of time to consider it, was not decided. I have recently read the evidence and briefs with

care and examined the authorities referred to, and am prepared to announce the conclusion at which I have arrived.

The testimony is, in a large degree, conflicting, and in many respects irreconcilable, but there are certain leading facts established, as I think, clearly by the evidence, on which, in my opinion, the case turns.

The tug Muir left her dock in the harbor of Milwaukee about 7 o'clock on the morning of the 4th of May, 1864, with the schooner Winslow in tow for the purpose of towing her out into the lake. The propeller Alleghany was near the mouth of the straight cut, making for the harbor, and being seen by the tug, was signalled to keep to the right, which signal was accepted. It is uncertain at what point in the river the tug sounded her first whistle, but it is not material, as the notice which the signal gave to the propeller, was in proper time. The tug and tow proceeded down towards the lake, and the propeller up the straight cut, until she struck the schooner in her port side, cutting down several feet below her water line so that she sunk within fifteen minutes. There can be no dispute that this collision was inexcusable, for it occurred on a bright clear day, with nothing to obstruct the view of the approaching vessels, the peculiarities of the navigation well known, and the wind not unfavorable. The important subject of inquiry is to ascertain who is to blame for it. In order to do this, it is not only necessary to consider the conduct and condition of the boats, but also whether the passage up and down the river and cut was beset with difficulties which all mariners accustomed to the port were presumed to know. The evidence shows where the Milwaukee river empties into the straight cut is a difficult point of navigation, difficult for even ascending boats to get the right turn into the river, and requiring a tug towing a vessel out into the lake to use care and skill to get the vessel properly straightened up between the piers. There is also near the inner end of the north pier shoal water, which causes heavily loaded vessels with large draught to sheer off if they go too near it. In the view I take

of this case, it is not necessary to determine the exact place where the collision took place. The evidence leaves it uncertain—it is strange that it is so, with so many persons witnessing it—but if not at the entrance of the piers, it was not far inside of them, and at all events the tow was not fairly straightened up in the cut when it happened. Did the captain of the propeller do all he could under the circumstances to avoid this collision? I think not—he knew he had to take the starboard side of the channel, and yet the answer says he kept only as far over to the starboard as he was able and not go aground, and that in proceeding as far as he did to starboard, his boat dragged the bottom, so that she would not mind her helm, and the evidence sustains the allegation of the answer that she would not mind her helm. Did not these considerations point out to the captain his clear line of duty? Having accepted the signal of the tug to go to the right of the channel, if, for any cause, he found himself unable to do so, he should have waited until the tug and tow passed. Pursuing the center of the channel was certainly not taking the starboard side of it, and going ahead at all after these warnings was experimenting in the face of danger. Besides, the tug had the right to full half the channel. The necessity for haste is not apparent, and it will be conceded that a good seaman would always act as if apprehensive of danger when meeting a tug and tow in a place no wider than the straight cut of the Milwaukee river, and with similar difficulties of navigation. It is said, it was as much the duty of the tug to have stopped as it was of the propeller. I do not think so. The propeller could stop at any time and reverse, while the tug could not without throwing the schooner around. If the critical point of navigation and the shoal water were equally known to both, yet the master of the propeller knew, better than the master of the tug, the unmanageable condition of his boat and the reasons for it. The tug could not know why the propeller was not under control, and had a right to presume that no boat liable to sheer because of too great draught of water would venture the ascent of

the cut with a tug and tow approaching, when a detention of two minutes at the farthest would relieve her of all trouble. The tug having signalled that she would keep to the south, it was her duty to do so, and if she had altered her course for any reason, she would have been properly chargeable in case of collision. As she could not stop without turning the schooner around, it was her duty to go ahead. The dangers of collision are greater in narrow rivers than in the open lake because vessels, in times of peril, cannot be so readily manœuvered in the river, and the interests of commerce imperatively require that all boats propelled by steam, in entering a harbor, should check down their speed so as to be under easy control. The Alleghany was in fault in not doing this. Some of the witnesses testify that four miles an hour is the usual rate of speed with which steam vessels enter the Milwaukee harbor, and that they can steer better while running at that rate than if the speed is less or greater. It is certain the Alleghany entered the cut running much faster—how fast it is not easy to tell, but the speed was not less than six miles an hour, and probably higher.

Whatever the exact rate of speed, it was too fast, as is proved by her bad sheering and inability to mind her helm. It would seem that the master, in his hurry to reach her dock, did not appreciate the responsibility of his position, nor apprehend danger until it was too late. If he misapprehended the speed of his boat or its effect before he entered the cut, as soon as he entered and saw she sheered badly, it was his duty to have checked down to a point that would have enabled him to have readily stopped her when he found difficulty in going to the starboard of the center of the channel. It is true, the engines of the propeller were reversed before the collision, but it was then too late, for the movement did not succeed in stopping, in time, the headway of the boat. That the propeller was in considerable motion at the moment of collision is demonstrated by the character of the injury which the Winslow suffered. The fault was in not doing sooner what was left undone until the peril was imminent. I do not interpret the evidence so as to charge

the tug or tow with fault. It is said they did not keep to the south of the channel, but the evidence which has weight with me, proves the contrary.

It is proper to state that I place slender reliance upon the testimony of the passengers on board the Alleghany who swear she was nearer the north than the south pier when the vessels collided. They mean to tell the truth, but I distrust very much their ability to judge of courses and distances on an element to which they are not accustomed, and this distrust is increased when I find they are contradicted by the weight of the remaining evidence in the case. Besides there are too many of them who swear too nearly alike.

It is insisted the tug and tow could with safety to themselves have gone further south. This may or may not be true, but if true, it was not a fault, for they left plenty of room to the north for any vessel that would mind her helm and would not sheer, and they were not required to go further south to accommodate a vessel in the predicament of the Alleghany.

The decree of the Court below is affirmed.

For opinion of Miller, J., in District Court, see *The Alleghany*, Volume 1 of this Series, p. 497. [*Reporter.*

BOUCICAULT vs. WOOD.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—NOVEMBER, 1867.

COPYRIGHT.

1. ACTION BEFORE PUBLICATION.—The right of action at law, as well as in equity, conferred by the copyright law of Feb. 3, 1831, may accrue before actual publication of the work.

2. The proper filing of the title of a work brings the author within the law, and the 5th section does not deprive him of his action for injury previous to publication.

3. The same rule applies to the supplemental act of Aug. 18th, 1856; and the author or proprietor of a dramatic work may maintain an action for infringement of his copyright committed after the filing of the title, but before publication.

4. FOREIGNER—RESIDENCE—INTENTION.—In order to entitle an alien to the benefit of these laws, he must prove himself a resident of the United States. Residence, within the meaning of the statute, is to be determined by his intention, accompanied by his acts, not simply by lapse of time. The fact that he left the country after filing the title does not necessarily deprive him of his rights; the change of intent does not avoid the copyright; but if previous to the filing he had such intention he is not within the protection of the statute.

5. SLIGHT ALTERATIONS.—It is not necessary that the play should be identical, word for word; and the alteration of a portion of the language would not deprive the author of his rights.

6. CONSENT of the author to publication abroad, places him in the position of a foreign author and is an abandonment of his rights under our statute.

7. REPRESENTATION NOT PUBLICATION.—By publication is meant publication *in print*. Representation upon the stage by or with the consent of the author, is not "publication."

8. COMMON LAW RIGHTS of authors run only to publication. Thereafter their sole protection is the statute.

9. For infringement on unpublished plays, there is no limit as to damages.

Action at law for infringement of copyright in three plays composed by plaintiff, "Pauvrette," "The Octoroon" and "Colleen Bawn."

The plaintiff was a native of England, and was never naturalized. He resided in New York city for several years, and there composed the plays in question, the titles of which he duly filed. He afterwards published "Pauvrette."

The "Octoroon" and "Colleen Bawn" were never published in print by or with the consent of the author.

The alleged infringement consisted in the representation of these plays at a museum, under the management of defendant.

The plaintiff counted under the statute for damages for wrongful representation of the plays, claiming that all had been duly copyrighted by him while a resident of the United States, and he also claimed damages at common law for unlawful use and representation of "The Octoroon," and "Colleen Bawn," which have never been published by him or with his consent.

Clarkson & VanSchaack, for plaintiff.

Geo. C. Bates for defendant.

DRUMMOND, J. charged the jury as follows:

The act of Feb. 3d, 1831,[1] protected the author of any book in the right to print and publish such book, provided he was a citizen of the United States, or a resident therein. The fourth section of that act declared how such author should proceed in order to make that protection available to him. It declared that he should not be entitled to the benefit of the act unless, before publication, he deposited a printed copy of the title of the book in the clerk's office of the district court of the district wherein he resided.

The fifth section declared that no person should be entitled to the benefit of the act unless he gave information of the copyright being secured, by causing to be inserted in the copy of each and every edition published, during the term secured, on the title page or the page immediately following it, a notice of the fact of such right being secured to him, and the words by which such notice was to be given were specified in that section.

The sixth section of the act provided for the recovery of cer-

[1] 4 U. S. Statutes at Large, 438.

tain penalties if any person or persons, after the recording of the title of the book, should publish, import or cause to be printed or imported, any copy of such book without the consent of the person legally entitled to the copyright thereof, first had in writing, and a forfeiture in money could be enforced by an action of debt.

The seventh section made the same provision substantially in relation to certain other works, such as a print, cut or engraving, map, chart, or musical composition.

It is apparent from what has been stated in relation to these various sections of the law of 1831, that there was a right of action before the publication was actually made. The fourth section of the act provided that the author of a book, within three months from the publication, should cause to be delivered a copy of the same to the clerk of the district court; but from what has been already stated, it is clear that a right of action accrued before the deposit of this copy of the book, because the language of the sixth and seventh sections is express, that if any other person or persons, from and after the recording of the title of the book should violate any of the provisions of those sections they were liable to an action for the benefit of the author, so that, under the act of 1831, there can be no doubt that not only a suit in equity, but at law, could be maintained before the publication of the work, for the benefit of any party aggrieved.

Turning then to the act of Aug. 18th, 1856,[1] and construing it by the light thrown upon the subject by the previous act of 1831, the question is, what rights there are under the more recent statute.

The act was declared to be supplemental to the act of 1831, and it set forth that "any copyright hereafter granted under the laws of the United States to the author or proprietor of any dramatic composition, designed or suited for public representation, shall be deemed and taken to confer upon the said author or proprietor, his heirs or assigns, along with the sole right to print or publish the said composition, the sole right also to act,

[1] 11 U. S. Statutes at Large, 138.

perform, or represent the same, or cause it to be acted, performed, or represented, on any stage or public place, during the whole period for which the copyright is obtained."

It will be observed that this act speaks of a copyright being obtained and granted, but it is clear that it does not necessarily mean that the title of the work shall be deposited with the clerk of the district court, and publication made, because that is not the meaning of the term in the original law, to which this is supplemental, as will be seen from what has been already said. The language of the fifth section of the act of 1831 is, that no person shall be entitled to the benefit of this act, unless he shall give information of the copyright. That section must be construed with the other sections which immediately follow it, the sixth and seventh, and, of course, it is not intended by this language to deprive of his action a party who may be injured between the time of filing his title in the clerk's office and the time of publication.

As I have already said, it in terms gives the right of action in such case. Then this suplemental act does not necessarily mean by the term "copyright being granted," that the book has been published and notice given; otherwise, the author of a book, under the act of 1831, would have a more complete remedy than the author of a play, under the supplemental act of 1856; so that, comparing the two acts together, and construing the latter by the light thrown upon the subject by the various provisions of the prior act, I think we may arrive at a conclusion as to what is the meaning of this clause of the act of 1856, namely: "and any manager, actor, or other person, acting, performing, or representing the said composition, without or against the consent of said author or proprietor, his heirs or assigns, shall be liable for damages, to be sued for and recovered by action on the case, or other equivalent remedy, with costs of suit, in any court of the United States; such damages in all cases to be rated and assessed at such sum not less than one hundred dollars for the first, and fifty dollars for every subsequent performance, as to the court having cognizance thereof shall appear to be just;" and it is this: that the act of

1831 having given a right of action between the time of filing the title of the book in the clerk's office and the time of publication, the above clause in the supplemental act also gives the right of action.

It seems to me that a little reflection will convince us that that must necessarily be so, and must have been the intention of this supplemental act. It is plain that the reason why the act was passed, was because the prior law did not give sufficient protection to the author of a play. The principal profits derived from plays are their representations on the boards of a theatre. Now, it is apparent if that representation could be made, at any time, without the consent of the author of the work, he would be injured pecuniarily in the profits to be derived from his work, because it is from that source, principally, that the profits are expected to come. The injury, it is apparent, would be just as great, and in most instances it may be presumed, greater, by the representation of his play before its publication than it would after. Take the case of the composition of a dramatic work and notice given, as the law requires, by leaving the title page with the clerk, and after that is done, the obtaining by clandestine or surreptitious means, of a copy of that play, and publicly representing it upon the stage of a theatre. That, of course, would be an injury, pecuniarily, to the author. The question, then, is, whether this law did not intend to protect the author against such use without his consent. I think that it did. I think when it says that any manager, actor or other person who shall represent the composition without the consent of the anthor shall be liable for damages, to be sued for and recovered by an action on the case, it means as well a representation made before as after publication.

No person is entitled to the benefit of these acts unless he be at the time of filing the title, a citizen of the United States, or a resident therein. Residence ordinarily means domicil, or the continuance of a man in a place, having his home there. It is not necessary that he should be the occupant of his own house; he may be a boarder or a lodger in the house of another. The

main question is, the intention with which he is staying in a particular place. In order to constitute residence, it is necessary that a man should go to a place, and take up his abode there with the intention of remaining, making it his home. If he does that, then he is a resident of that place. This question of residence is not to be determined by the length of time that the person may remain in a particular place. For example, a man may go into a place and take up his abode there with the intention of remaining, and if so, he becomes a resident there, although he may afterwards change his mind, and within a short time remove. So if a person goes to a place with the intention of remaining for a limited time, although in point of fact he may remain for a year or more, still this does not constitute him a resident. So it is his intention accompanied with his acts, and not the lapse of time, which determines the question of residence.

The plaintiff came to this country in 1853, and remained, pursuing his profession as an actor and author until 1861, and if at the time of filing the title he had his abode in this country with the intention of remaining permanently, he was a resident within the meaning of the law, even though he afterwards changed his mind and returned to England. If, however, he was a sojourner, a transient person, or at the time of this filing had the intention to return to England, he is not entitled to the protection of these laws.

You must, of course, be satisfied that the plays performed were the identical plays of which Mr. Boucicault was the author, not necessarily identical word for word, but the principle is that another has not the right to use the work of Mr. Boucicault's brain in the construction of a play, without his consent, and the mere alteration of a portion of the language would not deprive Mr. Boucicault of his protection, provided there was a substantial use of the play.

The fact that the two unpublished plays, after having been entered here, were published in England, would make no difference, unless that publication was with the consent of the plaintiff. No one would have the right to import and use them. Such

consent, however, would be an abandonment of his rights, under our laws, and place him simply in the position of an ordinary English dramatist, who had published his plays in his own country; but this consent must be affirmatively proved.

There having been no publication in this country of these two plays by him or under his authority, he is entitled by the common law, independent of the statute, to the property in them existing in manuscript. He may authorize their performance by others, or dispose of his property in them. By allowing them to be represented throughout the community for a long period of time without license or objection, he may be considered as having abandoned the use of them to the public, otherwise he has the right to call upon any person using them without his consent to respond in damages.

This is his common law right. The published plays he has given to the public, and his only protection is the statute.

As to the unpublished plays there is no prescribed limit to the damages, which are to be determined by the jury from the evidence.

Verdict for plaintiff, $900.

For a full citation of authorities on question of author's rights under a copyright, see the able brief of S. C. Perkins, Esq., in case of *Stowe vs. Thomas*, 2 American Law Register, (O. S.) 211.

See also *Laura Keene vs. Wheatley & Clarke*, 9 American Law Register, (O. S.) 33; *Daly vs. Palmer*, 6 Blatchford, 256; and *Keene vs. Clarke*, 5 Robertson, 38; *Greene vs. Bishop*, 1 Clifford, 186; *Boucicault vs. Fox*, 5 Blatchford, 87.

As to copyright of musical works under the statute, see *Jollie vs Jaques*, 1 Blatchford, 618.

As to rights of reporters and their publishers, see *Little vs. Gould*, 2 Blatchford, 165 and 362.

As to common law rights of authors, see *Crowe vs. Aiken*, *post p.*, 208. and numerous cases there cited.

The New York Court of Appeals have recently discussed the common law rights of authors, holding substantially as in this opinion that an author has at common law the exclusive right to the first publication; that the assignment of an alien author's right is valid, and within the cognizance of a court of equity; that representation of a dramatic composition upon the stage is not such a dedication as will authorize others to print and publish it without the author's consent; but that the manuscript and the author's right therein

are still within the protection of the law, the same as if they had never been communicated to the public in any form; and further holding that the state courts have jurisdiction of the common law rights of an author, and will protect an alien friend in the same manner as a citizen of the United States. *Palmer vs. DeWitt*, 47 New York, 532. [*Reporter*.

THE MARIA MARTIN.

CIRCUIT COURT.—EASTERN DISTRICT OF WISCONSIN.—SEPTEMBER TERM, 1868.

IN ADMIRALTY.

COLLISION.

1. A propeller ascending the Detroit River discovered the lights of an approaching barque and tug about two miles distant, the night being clear and starlight, but did not change her course until within half a mile of them, and then only enough to pass the tug at a distance of one hundred feet, when the barque suddenly sheered and struck the propeller amid-ships. *Held*, it was bad seamanship in the propeller to put only so short a distance between herself and the tug, and not slacken speed.

2. Though the proximate cause of the collision was the improper handling of the barque, the propeller, having committed faults, cannot go free.

3. It is immaterial that the propeller had not a competent lookout, the captain and mate having seen the lights in good season and needing no information which the lookout could give them. After they saw the lights the responsibility attached to them.

4. A vessel in tow is not excused from keeping close watch, and observing and obeying all signals.

Libel by the Northwestern Transportation Company, as owners of the propeller Cleveland, for damage caused by collision with the barque Maria Martin. Appeal from District Court.

The facts are stated in the opinion.

Messrs. Spaulding, Dickman and *Finches, Lynde & Miller*, for libellant.

Mr. George B. Hibbard, of Buffalo, and *Emmons & Van Dyke*, for respondent.

DAVIS, J. This case was argued last September with eminent ability, and for want of time to read the evidence was taken under advisement. Owing to my official duties in other circuits and the Supreme Court, I have been unable to consider it until recently. A very decided impression was made on my mind at the argument, which has been confirmed by an examination of the testimony. The result at which I have arrived is different from that of my learned brother, and I therefore state it with diffidence on account of his superior knowledge and larger experience. As the case will doubtless go to the Supreme Court, and as other engagements press heavily on me, I have deemed it necessary only to give my conclusions, and shall not therefore analyze the testimony in order to prove their correctness. In all cases of this kind the evidence is conflicting. The rules of navigation being well settled are easily applied to the facts in proof, but the difficulty lies in ascertaining the facts. The propeller Cleveland, owned by the libellants, on her voyage from Ogdensburg to Chicago, during the night of the 22nd June 1866, while in the Detroit river and near its mouth, collided with the barque Maria Martin, in tow of the tug McClellan on their way down the river and was sunk.

The point to ascertain is, with which party, if either, or both, the fault rests. It is proper to remark, if the night had been dark and there had been difficulty in discovering objects on the water, some excuse would have been afforded for this collision, but as there was a clear starlight, and the signal lights of all the vessels burned brightly, and gave sufficient indications to careful mariners, the accident ought not to have happened. After the propeller entered the river, she steered north by east and headed for the Bois Blanc light, and her officers discovered at the distance of about two miles, the lights of the tug and

tow. It is not important to determine whether the propeller blew her whistle after the first or second whistle of the tug was sounded, for that she understood the signal is evident, because she ported her helm at the distance of half a mile from the tug, She swung to starboard about half a point and then steadied, the tug being to the westward of her port bow, and there is no evidence that the barque was not then nearly in range with the tug. After the tug blew her whistle, she also ported half a point and then steadied. She was then heading south-west by south one-half south. The propeller pursued her course until she was abreast of the tug—distant about 100 feet—when her wheel was put hard a-port, and she swung to starboard. This change of course was rendered necessary, as the libellants say, because the barque took a sudden sheer to port, shutting out her red light, and showing only her green light to the Propeller, but if so, it availed nothing, for the barque struck the propeller on her port side, as she was swinging to starboard, and she went to the bottom of the river. The libellants do not charge that the tug was in fault, but insist the propeller was blameless, and that the responsibility for the collision rests wholly with the barque. This position is not well taken. It is clear the collision occurred in a few minutes after the propeller answered the tug's whistle, and that her officers could see, owing to the calmness of the night and the conceded brightness of the lights, that the vessels were in close proximity to each other.

It is equally clear that they knew that the Detroit river, on account of the magnitude of its commerce, and the number of tugs with loaded vessels, passing through it, had to be navigated, to avoid accidents, with great watchfulness and care, and that the tug and barque, whose lights they had made, as they were descending the river, could not be handled, in case of peril, as well as the propeller. Notwithstanding these things, we find these officers managing their boat without regard to the dangers of navigating this river, and exercising no more watchfulness than if they had been navigating the open lake. Although they saw the lights of the tug and barque and pronounced them to be very bright at the distance of two miles,

yet they did not change the course of their boat until the tug had signaled them to do it, and at this time the vessels had approached within half a mile of each other. But even then by the practice of reasonable seamanship all trouble could have been avoided. If the propeller, instead of porting half a point, or three-fourths even, had gone a point further to the eastward, the collision could not have taken place. There was nothing in the way of her doing this, for the river was wide enough and there were no lights closing on them from the east. To put only one hundred feet between her and the tug, when she could with safety to herself put a greater distance between them, considering the circumstances of this navigation, was bad seamanship. Watchful and careful officers, having due regard to the rights of persons and property, would not have taken the risk that the officers of the propeller did. They surely risked enough by not changing the course of their boat until she was close on to the tug. Common vigilance required that when they changed the course of the propeller they should have made a more decided change. But these officers, besides not going further to the eastward, were in fault in not checking the speed of their boat. They should not have entered a narrow river, where, in the night, there is always more or less danger of collision, without materially slackening the speed at which they had been running. And this duty was the more incumbent on them, because at so short a distance from the tug and barque they should, as careful seamen, have apprehended the possibility of danger. It will not do to say the propeller performed her whole measure of duty, because she safely passed the tug, and that the proximate cause of the collision was the improper handling of the barque. The propeller, having committed faults, cannot go free because the barque was also in fault. It is said the propeller had not a competent lookout, but whether she had or had not is immaterial, because this collision was not caused by any omission of duty on her part The captain and mate of the propeller, standing abaft the cap stan, with the lookout near by, in his proper position, at a distance of two miles discovered the lights of the approaching

tug and barque, and from this time forward were in command of the ship, and needed no information that the lookout could give them. It would have been a useless thing to point out to them the lights which they saw in good season, and were commenting on as being very brilliant. After they saw the lights, the responsibility attaches to them; and if the ship was afterwards badly managed, the lookout is not to blame for it.

The next question for solution is, whether the responsibility for this collision rests with the propeller alone, or was the barque in such fault that the damages must be divided. It is plain, notwithstanding the faults of the propeller, that this disaster would not have occurred had the barque followed, as she was required to do, the course of the tug. That she did not follow after the tug, but, when the propeller was abreast of the tug, sheered to the port of the tug, shutting out from the propeller her red light, and showing only her green light, and continued on in this course until she struck the propeller on her port side as she was swinging to starboard, are facts clearly established by the weight of the evidence. The current or wind did not cause the sheering, for the barque moved faster than the current, and the wind, being south-west, would not cause her to sheer to port, and the officers of the boat say she steered well. It is said the fault was on the part of the tug, because at the critical moment she altered her course and turned short off to starboard. But the weight of the evidence is against this view of the case. After the tug blew her whistle she ported, as has been before stated, a half point, and then steadied herself back on her course, and was pursuing it when the propeller came abreast of her, and continued in it until after the collision. I agree that it is not easy to reconcile the sheering of the barque with the testimony of those on board of her, but we are more concerned to know that the sheering *did* occur than to show *how* it occurred. There have been many theories on this important question presented for consideration, but I have not time to examine them. The conduct of the barque was the result of either mistaking

orders or careless management. We have the testimony of the mate that an important signal was mistaken, and it is not at all unlikely that the error in management commenced with this mistake.

It is in proof that the barque through the night did not steer after the tug, and, as she was a good steering vessel, the inference is plain that there was a want of proper observation on the part of those who had her in charge. The approach of the propeller was not regarded by her, because the officers of the deck understood the signal of the tug for casting off line, instead of an approaching vessel. If a vessel is in tow she is not therefore excused from keeping close watch and observing and obeying all signals. The duty of watchfulness was the greater because the river was full of boats, and, light as the night was, there was more necessity for it than if it had been daylight; but this duty does not seem to have been appreciated by the officers of the barque.

When the barque made the sudden sheer to port, the propeller, not being required to anticipate it, did all she could under the circumstances—put her wheel hard a-port.

It follows from what has been said that a decree should be entered dividing the loss, and it is so ordered.

This case was affirmed, on full argument, by the Supreme Court, 12 Wallace, 31.

The liability of a steamer, at night, in approaching too near a sailing vessel, when there is room to give her a wide berth, enforced. *The Western Metropolis*, 6 Blatchford, 210. See also *The Alabama* and *The Gamecock*, 1 Benedict, 476. [*Reporter*.

UNITED STATES vs. TWENTY CASES OF MATCHES.

DISTRICT COURT.—DISTRICT OF WISCONSIN.—OCTOBER TERM, 1868.

FORFEITURE UNDER REVENUE LAWS.

1. Goods landed without a permit from the proper collector, and naval officer, if any, are subject to forfeiture to the United States.
2. It is no defence that the unlading was without the knowledge or consent of the owner or consignee; that it was at an intermediate port and not at the port of destination; and that it was an unlawful act on the part of the master. The forfeiture attaches upon the unlawful unlading, wherever that may be.
3. The facts that these goods were the production of the United States, and simply transported through a foreign country, and were exempt from duty and that all the laws and regulations relating to such transit had been strictly complied with, does not remove the necessity of procuring a permit.
4. The information is well brought under the 60th section of the act of 2d March, 1799.

Information for violation of the Revenue Law.

The facts appear in the opinion.

J. B. D. Cogswell, U. S. District Attorney, for the United States.

Palmer, Hooker & Pitkin, for respondents.

MILLER, J. The information propounds that the matches were seized at Milwaukee on land. It charges that they were brought in the propeller Montgomery, from Sarnia in Canada; and were unladen from said vessel at the port of Milwaukee without a permit from the collector of said port, there being no naval officer.

It is alleged in the answer of claimants that they manufactured the matches at Portland, in the State of Maine, and

packed them in close cases, and shipped them at Portland for Chicago in the State of Illinois, on the Grand Trunk railway, a corporation of Canada extending from Portland to Sarnia; that the matches were not intended to be delivered at Sarnia, or at Milwaukee, but were shipped direct to Chicago, and to be transported by lake from Sarnia to Chicago. For that purpose the matches were shipped on board the Montgomery, a vessel employed by said railway company running in connection with the railway from Sarnia to Chicago, thereby furnishing a through line from Portland to Chicago. The boxes of matches were unladen from the propeller by the master, at Milwaukee without the knowledge or consent of claimants, and contrary to the agreement under which they were shipped and transported by said railway company. And they were not so unladen with intention of vending them in the district of Wisconsin, or of avoiding any law of Congress, or any regulation of the treasury department, or of avoiding the payment of government charges. The answer further pleads and sets out at length the regulations of the treasury department for the transportation of goods through Canada.

The district attorney filed exceptions to the answer, as not being responsive to the information, and no defense against the alleged cause of seizure.

Section 50 of the act to regulate the collection of duties on imports and tonnage, approved March 2, 1799[1] directs, "that no goods, wares or merchandise brought in any ship or vessel from any foreign port or place shall be unladen or delivered from such ship or vessel, within the United States * * * without a permit from the collector, and naval officer, if any, for such unlading or delivery." The section imposes a penalty for such unlading or delivery, and authorizes the seizure of such goods, wares and merchandise as forfeited; and when their value amounts to four hundred dollars at the port or district where landed, the vessel is also declared subject to like forfeiture and seizure.

The seizure was made under this section of the statute.

[1] 1 U S. Statutes at Large, 665.

Milwaukee is a port intermediate the ports of Sarnia and Chicago. The goods could not be delivered at this port without the consent of the owner or consignee. They were put ashore or unladen at this port by the master of the vessel, without the consent of the owner or consignee, and without the required permit. It was an unlawful act on the part of the master of the vessel, if within the prohibition of the section of the act above quoted.

It will be observed that the section embraces all cases of unlading of goods without a permit within the United States. The forfeiture attaches whether the unlading is at an intermediate port, or at the port of destination and delivery, or at any place within the United States. The public mischief is equally great whether the unlawful unlading is at a port or elsewhere. The object of the law is to prevent frauds upon the revenue. In the case of the schooner *Industry*, 1 Gallison, 114, goods were unladen at an intermediate port without the required permit, and the seizure was sustained. It was contended that the information should have been brought under section 27 of the act, as in *United States vs. The Virgin*, 1 Peters C. C. 7; *United States vs. Brant*, Id. 14; *United States vs. The Hunter*, Id. 10. I am satisfied that the information is well brought under section 50 of the act, and that the goods were *prima facie* subject to seizure at the port of Milwaukee. The *onus probandi* is thrown on the claimants, and if they fail to remove the presumptions which the law raises, condemnation must follow.[1]

The act to prevent smuggling approved June 27, 1864,[2] made it the duty of the propeller to put into the port of Milwaukee, the first American port of entry on her route from Sarnia.

By chapter 68, approved March 2, 1861,[3] "goods, wares and merchandise, the growth, production or manufacture of the United States, exported to a foreign country, and brought back to the United States in the same condition as when exported,

[1] The Luminary, 8 Wheaton, 407.
[2] 13 U. S. Statutes at Large, 197.
[3] 12 U. S. Statutes at Large, 194.

upon which no drawback or bounty has been allowed, are exempt from duty, *provided:* That all regulations to ascertain the identity thereof, prescribed by existing laws, or which may be prescribed by the Secretary of the Treasury, shall be complied with." The matches in every particular were within this act, and were free of duty. The regulations of the treasury department relate to the transportation of goods while in their transit through the foreign country. These regulations may have been strictly complied with, but they have no relation to the duty imposed on the vessel to procure a permit for unlading the matches at the port of Milwaukee.

The law under which this information is brought, prohibits the unlading or delivery of goods, wares or merchandise brought from any foreign port or place, whether they be dutiable, or not, without the permit of the collector. Nor is it any excuse or defense, that the master of the vessel put the goods ashore without the knowledge or consent of the owner or consignee, The revenue laws leave all errors or mistakes of shippers and carriers to be settled among the parties interested.

The answer is not responsive to the information, and the exceptions thereto must be sustained.

UNITED STATES vs. DUTCHER.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—OCTOBER TERM, 1868.

DISTILLERS' BONDS.

1. The claim of the Government under distillers' bonds for the payment of a tax, is not a penalty, nor in the nature of a penalty.
2. A bond given under the Act of July 13th, 1866, is not a penalty, but a contract and security, and is not affected by the repealing act of January 11, 1868, nor are suits or prosecutions instituted upon such a bond abated.
3. A distiller cannot avail himself of any mistake of the officer in over-gauging the spirits. The law is imperative.
4. The tax must be paid at the rate prescribed by the law in force at the time the bonds were given.

Suit upon a distiller's bond given to the United States under the Act of July 13, 1866.[1]

Three cases were submitted to the court under the following state of facts:

In November, 1866, the defendant Dutcher, who was a distiller, had certain highwines in a bonded warehouse at Amboy, Ill., and desired to remove them to New York, and thereupon made application to the proper authorities for leave to remove them, and in accordance with the law and practice, he gave bonds under which he was authorized to remove them from Amboy to a bonded warehouse in New York.

Prior to their removal, in conformity with law, the highwines were inspected, and on their arrival in New York were again inspected, and it was ascertained that there was a deficiency in the quantity, as compared with what the inspection showed at Amboy, and there being three different bonds given, and a deficiency under each, on the 20th day of May, 1868, suit was

[1] 14 U. S. Statutes at Large, 163.

brought upon the three separate bonds against Dutcher and the sureties, to recover for the deficiency.

Jesse O. Norton, U. S. District Attorney, for the United States.

George C. Bates, for defendants.

DRUMMOND, J.—Various objections have been made on the part of the defendants, which I will proceed to consider in their order.

In the first place, it is claimed that the law under which these bonds were given, has been repealed by the law of January 11th, 1868.[1] The law under which the bonds were given, was passed on the 13th of July, 1866. It is claimed that the repeal of the law in 1868 deprived the Government of the right to institute suits upon these bonds, and also prevented the Government from prosecuting them after suits had been instituted; in other words, that the repeal of the law puts an end to all proceedings connected with these bonds, and all right or claim to sue upon them—and on the ground that this is a penalty—the rule being that unless there is a saving clause all penalties under the law fall with the repeal of the law. This rule is not disputed and is well established. The only question connected with this part of the case is whether this is a penalty. We think it is not. The highwines were in the bonded warehouse at Amboy, for the purpose of securing the Government in the payment of the tax. They were permitted to be removed to a bonded warehouse elsewhere, (in this instance to New York) upon giving sufficient security. When they arrived at the bonded warehouse in New York, they were held there for the payment of the tax; they were taken out of the custody of the Government and given to the owner, in order that they might be transferred, and, of course, the Government losing all control of them, the bonds stand as security to the Government for the payment of the tax and for nothing else. When the parties executed the bonds, they made a contract with the Government, not in the nature of a penalty, but for the purpose simply of paying the tax which was

[1] 14 U. S. Statutes at Large, 483.

due to the Government. The only question is whether the repeal of the law, by the act of January 11th, 1868, which declares that thereafter the tax should be paid before distilled spirits should be removed from a bonded warehouse, destroyed the contract which the parties had previously made with the Government for the payment of the tax. This contract was lawful when it was entered into. It was for the payment of a sum that was due to the Government, and it is difficult to see how the mere repeal of the law can destroy the contract, and put an end to a right on the part of the Government, which was absolute—namely, the payment of the tax. It is not a penalty. It is a sum claimed to be due the Government for its support, like any other tax, and is not in the nature of a penalty. But independent of this, the repealing law, it is clear, was not intended to prevent the operation of such contracts as this. By virtue of prior laws the owner of highwines had a right to remove them from a bonded warehouse, upon giving a bond under such regulations as the Commissioner of Internal Revenue might prescribe without the payment of the tax, and this law merely says that hereafter it cannot be done, but before the removal of the highwines from a bonded warehouse, all taxes must be paid, and then comes in the clause that, "All acts, and parts of acts, inconsistent with the provisions of this act be and are hereby repealed."

The contract that was thus made was not inconsistent with the provision. It was voluntarily entered into by the parties with a view of paying the taxes which were due the Government. Therefore, it is clear—and both of us concur in this—as we do in all the conclusions given in deciding these cases—that the repealing law did not destroy the contract entered into between these parties and the Government for the payment of the tax.

The next question is whether the parties are bound by the bonds which they have given, in which is stated the quantity of highwines, as by the inspection of the proper authority at Amboy.

The evidence of the officer in New York and the officer at Amboy who inspected the highwines has been taken, and it

appears from the evidence that the inspector at Amboy certified that the wines were of greater quantity than was the fact; in other words, that he gauged the casks of highwines too high.

The question is, whether the defendants can avail themselves of this difference, on the ground that there was a mistake made in gauging the liquors. We think they cannot. The 40th section of the act of 1866 provides that all distilled spirits which had been inspected, gauged, proved and marked by the inspector, according to the provisions of law, might be removed, without the payment of the taxes, from a bonded warehouse, under such rules and regulations and on such bond or security as the Commissioner of Internal Revenue, subject to the approval of the Secretary of the Treasury, might prescribe, and that they might be transported to any general bonded warehouse; that after their arrival there they were to be inspected, and that "the tax shall be paid on the difference between the number of proof gallons stated in the bond given at the place of shipment and the number received at the warehouse, less the allowance for leakage as established by the regulations of the Commissioner of internal revenue." Observe, the tax shall be paid on the difference between the number of gallons as stated in the bond and the number received at the warehouse less the allowance for leakage, etc., "and, except for actual destruction by unavoidable accident, by the elements or by the public enemy, no other allowance for loss shall be made."

Now we think the language of this section imperative, and too explicit to allow us to admit any evidence tending to show that there was a mistake made in the gauging of the liquors, the language of the section being that the tax must be paid on the difference between what the bond states as inspected and the amount as received at the place of transfer, and that no other allowance shall be made except of a particular character, and the claim here not coming within the exception. That exception, of course, was intended to provide for any destruction without any fault or neglect on the part of the owner in the transit of the property from one bonded warehouse to another, as by fire, by breakage of cars, and everything of that sort. It is a hard

rule, undoubtedly, for I am satisfied that there was a mistake made, but it is a mistake that we cannot remedy. They must, therefore, pay over the tax for the difference in the quantity after making all such allowances as the regulations prescribe, and as, after such allowance, there is a deficiency, which is admitted, for that deficiency the defendants are liable upon their bonds.

Another objection has been made, that, conceding the defendants are liable, they are liable only to the extent of sixty cents per gallon, and not for two dollars, as the law then was; and it is claimed that the bond stands in the place of the highwines, and if the wines were in the bonded warehouse in New York, the Government could only have now what is the present tax, and could not recover or have what was the tax by the law of 1866. What has become of these highwines we do not know, whether they are there or have been sold, but the theory of the case proceeds upon the ground that the defendant, who owned these highwines, and in whose custody and control they were, has abstracted from the casks, without the payment of the tax, a certain quantity of liquor. Whether he has done so in fact or not, is not material; that is the theory upon which the cases proceed, and, of course, we must take it just as it exists, and decide upon the principle which there is in the cases, and that being so, the defendants must pay the tax which was due under the law in force at the time, namely, two dollars per gallon.

However, as I am satisfied that there was a mistake, as I have already said, in the quantity of highwines as certified, it would afford me pleasure, and I have no doubt it will also my brother judge, to certify to the proper authority that the evidence does establish this conclusion, in order that the parties may apply there for a reduction of any sum which may be recovered against them.

In this way the defendants may obtain the relief they ask from the court, and which we think the court is not competent to give. I have been told that the Commissioner of Internal Revenue has in some instances taken sixty cents a gallon under

similar circumstances. If that has been done, it shows (I understand it is now repudiated) an inconsistency which ought not to exist.

But the courts of the country, while treating the decisions of a bureau at Washington with due respect, must decide all legal questions arising before them according to their own views of the law.

Judgment for the United States.

Davis, J., concurring.

THE PORTSMOUTH.

DISTRICT COURT.—NORTHERN DISTRICT OF ILLINOIS.—NOVEMBER TERM, 1868.

IN ADMIRALTY.

ENTERING HARBOR.—JETTISON.

1. The captain of a propeller having run more than a day without accurate means of determining his position, supposed that the port of Waukegan, which he reached during the night in a fog, was Chicago, his destination. In attempting to enter, at ordinary speed, he grounded, and jettisoned part of the cargo. There was no necessity on account of either sea or wind to make the harbor at once. No effort was made to get lighters. *Held*: The captain was guilty of negligence—

1st—In attempting to enter the harbor until certain of his location.

2d—In not advancing slowly and with the utmost skill and caution.

3d—In not attempting to save the cargo.

2. The owner of the cargo has a right to insist that the captain shall not with his vessel take the chance of entering a harbor of which he is not certain, and without necessity.

3. Mariners must be held to the exercise of all reasonable skill and prudence.

4. After a vessel is stranded, the captain is bound to take all possible care of the cargo.

The Portsmouth.

Libel by the Salt Company of Onondaga for a quantity of salt jettisoned while the propeller was aground at the harbor of Waukegan.

The facts are fully stated in the opinion.

Waite & Clarke, for libellant.

Rae & Mitchell, for respondents.

DRUMMOND, J.—The facts of this case are briefly these: The libellant, on the fourth day of October, 1866, shipped, at Buffalo, on board of the propeller Portsmouth, then bound for Chicago, two thousand barrels of salt, under a bill of lading in the usual form, and which declared that the dangers of lake navigation only were excepted.

The propeller, shortly after, left Buffalo, and, on the 9th day of October, arrived at the Fox Islands, in Lake Michigan, discharged some portion of the cargo there, took in additional cargo, and, on that evening, at about seven o'clock, left the Islands, bound direct for Chicago, there being, at the time, a north-east wind, with considerable sea. The propeller kept her course that night and all the next day, the fog still continuing until about six o'clock in the evening, when, the fog lifting a little, a church steeple was discovered on the west shore of the lake, and what seemed to be a house. The captain supposed that this was Racine, in Wisconsin, and continued on his course up the lake upon that supposition.

Between two and three o'clock on the morning of the 11th, a light was discovered, and the sound of a whistle, which was supposed to be that of a tug, was heard, and the movement of cars upon the shore. It was concluded that this was Chicago. The propeller had passed by, and to the south of, the supposed port and turned round to the north with a view of entering the harbor. The fog still continued. They could not see their way before them. All that they saw was the light, and all that they heard was the sound of the whistle and the movement of the cars.

Upon this evidence they acted, and attempted to enter the port upon the presumption that it was Chicago.

As they entered, the mate, who was forward—as they came very close to the pier—discovered that it was not the pier at the Chicago harbor, and gave immediate notice to the captain, who was on the pilot house. The propeller was backed, but, in a short time, struck upon the bottom; and it proved to be, not the port of Chicago, but that of Waukegan.

The clerk was immediately sent ashore, and dispatched to Chicago for a tug, which arrived at Waukegan in the afternoon of the 11th, the captain having, in the meantime, jettisoned a portion of a cargo and, among the rest, a quantity of salt belonging to the libellant—the propeller not having been removed from her position prior to the arrival of the tug.

They were unable to get the propeller off until the following morning, when she proceeded on her voyage to Chicago, less that portion of the cargo which had been thrown overboard.

The rule upon the subject is this: If the loss happened by a peril of the lake, and it could have been avoided by the exercise of any reasonable skill or diligence at the time, the carrier shall not be excused, but shall be held liable.[1] The subject is very fully discused by the Supreme Court of the United States, in the case of the propeller *Niagara vs. Cordes*, 21 Howard 7, in which that court says, that losses arising from the dangers of navigation, within the exception ordinarily contained in bills of lading, such as in this case, are not those that are in any degree produced from the intervention of man: they are such as happen in spite of human exertion, and which cannot be prevented by human skill and prudence.

The question is, whether under the circumstances of this case the captain of the propeller acted with all the skill and prudence necessary. While admitting that the case is not entirely free from difficulty, I do not think that he did.

It will be recollected that the only means the captain had to determine his position on the 10th, when they caught a glimpse

[1] Angell on Carriers, 167, *et seq.*

of land, were the speed of the propeller and the land. At that time, the observation which was made was confessedly indefinite and indistinct. The captain supposed that it was Racine, because he thought that the propeller had made that progress during the day and the preceding night; not because there was anything in the aspect of the church spire or house that he saw to give character to the locality.

It may be doubted whether there was enough in the case to warrant the conclusion that the propeller had sailed that distance; as it is clear, from subsequent circumstances, she had not.

But, without insisting on great strictness as to the actual progress the propeller had made in the meantime, from the Fox Islands up to six o'clock on the evening of the 10th, still, it is clear that there was not enough in the observation which had been made, together with the doubtful conclusion derived from the progress of the vessel, to justify those on board, absolutely, in the conviction that there was before them any particular place. The most that could be said was, that it was a matter of doubt; and in point of fact, the mistake that was made in the progress of the vessel must have been from thirty to forty miles; that is to say, they supposed they were thirty or forty miles nearer Chicago, on the evening of the 10th, than they actually were.

The time that they arrived at and were about to enter the supposed harbor of Chicago, was not far from three o'clock in the morning. The fog was still thick. The evidence they had that this was the port of Chicago, was confessedly vague and indefinite. There was nothing to justify them, absolutely, in the conclusion that it was Chicago. It is clear that those on board the propeller, although they thought they were entering the port of Chicago, still, were not certain that they were so doing. The question is, whether they were justified, under the circumstances, in taking the chances and acting upon the presumption that it was the port of Chicago.

As I have already said, I think that, under the circumstances

of the case, with the evidence before them as to where they were, the hour of the morning and the state of the weather, they ought to have remained until the approach of light or the lifting of the fog rendered it certain where they were.

It is to be observed that there was no imperative necessity, either in the sea or the state of the wind, for their making the harbor. There was no great risk, either to the propeller or to the cargo, in remaining off the port where they were until it could be ascertained with certainty what their situation actually was.

Again, admitting that the captain was justified, under the circumstances, in attempting to enter the harbor on the suspicion that it was Chicago, I think that proper precautions were not taken.

If they were justified in entering the harbor at all, the utmost caution and skill should have been used. They should have felt every step of the way. They should have advanced only with sufficient speed to give adequate and proper steerage way to the propeller. The engineer says that they were entering with the usual speed. The witnesses do not all agree upon this point; but I think it is manifest that they were advancing too rapidly at the time; and, it is apparent that, if they had exercised more caution, the risk to the vessel and cargo, even if they had struck, would not have been nearly so great as it ultimately proved to be. So that, on both grounds, I think there was not that degree of skill and prudence exercised that there ought to have been under the circumstances of the case.

It is true that something ought to be allowed to the opinion of the responsible party, whose duty it was to decide at the time—the captain of the propeller; but, while this is true, it must not be forgotten that there is also something due to the owner of the cargo, and that it is not just or right that the captain, in the exercise of the responsibility which devolved upon him, under circumstances like these, should take the chances which then, it was apparent, existed. There was a chance that

it was the harbor of Chicago; there was a chance that it was not; the captain was not justified in taking this last chance.

I think it is the duty of the courts to hold mariners, under circumstances like these, to the exercise of all reasonable skill and prudence. Therefore it is that I hold the propeller accountable for the loss which occured in this case. We excuse them if the loss happened from dangers of lake navigation; but it must be clear that the loss has happened in consequence of such danger. If it appears that the exercise of proper skill and prudence might have prevented the loss, then the carrier must be held responsible.

Again, I am not satisfied with the conduct of the captain after the vessel was stranded.

The rule laid down by the Supreme Court of the United States in the case already referred to, is that, after the vessel is stranded, the master is bound to take all possible care of the cargo.

When the vessel went ashore, the captain sent for a tug. No effort was made to get lighters. No attempt was made to save the cargo; but the cargo, or a portion of it, including the salt of the plaintiff, was thrown overboard and piled up upon the bottom, so that many of the barrels rose above the surface of the water, and were subsequently saved by parties, residents of Waukegan. There was a heedlessness, even a recklessness, on the part of the captain, in regard to the jettison of a portion of the cargo, which I hardly think, under the circumstances, can be justified.

But, inasmuch as some of the witnesses examined think that the captain was justified in the jettison that was made, I do not place the decree upon this ground.

But my opinion is, that if proper exertion had been made, a part, if not the whole, of the cargo might have been saved. The vessel was not more than fifty feet from the pier; lighters might have been obtained, and certainly a portion of the cargo saved. And it will be recollected that the wind was subsiding and the sea falling.

Decree for libellant for the value of the salt, belonging to the

libellant, which was thrown overboard.

This case was then appealed to the Circuit Court, and Judge Davis, of the Supreme Court, sitting as circuit judge, adopted fully the opinion of Judge Drummond.

The Supreme Court again affirmed the decision in 9 Wallace, 682, *q. v.* [*Reporter*.

WOOD vs. THE MICHIGAN SOUTHERN AND NORTHERN INDIANA RAILROAD COMPANY.

CIRCUIT COURT.—DISTRICT OF INDIANA.—NOVEMBER, 1868.[1]

IN EQUITY.

RIGHTS OF ASSIGNEE OF PATENT, AFTER RENEWAL.

1. The assignee of a patent holding at the expiration of the first term a right during that term to "make, construct and use" the article patented, may, during the term of its subsequent extension, continue to use it and even repair it, but is not entitled to make it for use, or for any other purpose.
2. Section 18 of the Act of July 4, 1836, construed.
3. Whether this doctrine applies to a process.—*Quære.*

This was a bill in equity, filed to restrain the defendants from infringing letters patent for an "improvement on the mode of operating brakes for cars," granted to Nehemiah Hodge, October 2, 1849, re-issued March 1, 1853, extended to him for seven years from October 2, 1863, and by *mesne* assignments vested in complainant within and for the territory within which the defendant's road was operated.

The facts appear in the opinion of the court.

F. L. Ketchum, for complainant.

Wing & Niles, for defendant.

McDONALD, J.—This is a proceeding in chancery, submitted to us for hearing and decree on the bill, answer, exhibits depositions and certain admissions of the parties, made in open court.

The bill charges that on October 2, 1849, one Nehemiah Hodge duly became the patentee of a new and useful improvement in the mode of operating brakes for railroad cars; that by reason of an inadvertence in the description thereof, another patent for the same invention was issued to him, to take effect from the date of the first, for the term of fourteen years; that on September 16, 1863, the Commissioner of patents renewed and extended to Hodge the same patent, for the further term of seven years; and that by the various assignments set out in the bill, the complainant, several years ago, became and now is the legal and equitable owner of so much of the patent right and extension as is included within the territory within which the defendant's railroad is situate. The bill further charges that the defendant, in violation of the rights of the complainant, has "for a long time heretofore manufactured, vended and used, and is still using, manufacturing and vending within said territory a large number of brakes for cars, each embracing substantially in principle, construction and mode of operation, said improvement."

The bill shows that by various litigations with other railroad companies the complainant has established his exclusive right to make, vend and use said improvement, and prays a temporary injunction and general relief.

The answer admits the issuance of the letters patent and the renewal as stated in the bill; that the defendant has manufactured and used on its road, and still manufactures and uses thereon, the brakes in question. But it denies that the defendant has ever manufactured for sale or sold any of these brakes.

The answer claims that the defendant has the right to manufacture for the use of the railroad company, and to use on its road, the brakes in question. The answer founds this claim on two assignments, of which exhibits are filed. The first of these assignments is by Stephen M. Whipple, whom the bill alleges to have been the owner of so much of the patent right as relates to the State of Indiana. The other assignment is from Hodge, himself.

The assignment from Whipple is dated November 14, 1854. This assignment, after reciting that Hodge had conveyed to Whipple, on July 28, 1852, the right to his patent brakes for the state of Ohio, etc., purported to transfer to the defendant, in consideration of five hundred dollars, the right to construct and use these brakes on any and all cars belonging to the defendant, "to the extent following, viz.: from Toledo to Chicago, and branches; also the right of running their said cars, with the said improvement thereon, on and over other roads having purchased the like rights, for and during the term for which said letters patent are or may be granted."

The assignment from Hodge, dated January 17, 1854, after divers recitals, purports to assign to the defendant the right to construct, make and use said improvement on any and all cars belonging to said company and used on their said railroads, for and during the term for which said letters patent were granted."

There is the general replication.

The existence and due execution of all the letters patent and assignments mentioned in the answer and bill are admitted in open court by all the parties. Nor does the complainant deny that by virtue of the said assignments to the railroad company the defendant had the right to make and use on the company's road these brakes during the first fourteen years of the existence of the patent right. Nor is it claimed in argument that the defendant has ever manufactured for sale or sold any of these brakes. But the complainant insists that said assignments to the defendant are no justification on the part of the company to make and use these brakes after the first fourteen years of the

patent: and the defendant insists, on the contrary, that said assignments gave to the company the right to make and use the brakes as well during the period of the renewal as during the first fourteen years of the patent. And this is really the only question of any consequence in dispute between the parties.

In support of the ground thus assumed by the complainant, he argues that the words of the assignments to the defendant expressly limit the right of the company to make and use these brakes to the term of first fourteen years. As we have already seen, Whipple's assignment is "for and during the term for which said letters patent are or may be granted," and it was executed within the first fourteen years of the patent. Hodge's assignment was made to the defendant within the same period, and for and during the term for which said letters patent are granted.

Construing these two assignments without reference to the act of Congress on the subject of patent rights, we should not hesitate to say that they convey no authority to the defendant to manufacture and use the brakes in question after the expiration of the first term of fourteen years of the patent; and that the subsequent making and using of them was a violation of the complainant's right. Indeed, the counsel for the defence seem to agree with us in this. But they argue that in construing the assignments we must take into consideration the eighteenth section of the Patent Act of July 4, 1836. That section provides that "the benefit of such renewal shall extend to assignees and grantees of the right to use the thing patented to the extent of their respective interests therein."[1]

To every assignee or grantee of a patent holding the right at the expiration of the first term of it, to use the thing patented, this section of the act plainly gives the same right to use it during the term of the renewal of the patent, exactly to the extent to which he had the right to use it under the first term of the patent. And it is clear that he may not only use it, but repair

[1] 5 U. S. Statutes at Large, 124.

it for use till it is worn out. So the Supreme Court has decided.[1]

On the contrary, it is equally clear that this section does not authorize the assignee or grantee either to sell or to manufacture for sale the thing patented, for the terms of the section only embrace "assignees and grantees of the right to *use*."

But the case at bar occupies a middle ground. Here the the assignee is not an assignee of the right to make for sale or to sell, nor an assignee of the right merely to use, but an assignee of the right to "make and use."

And the defendant, disclaiming the right either to manufacture for sale or to sell, insists merely on the right to make for use on the company's road, and to use on that road, the brakes in question.

Now it is conceded by the complainant that the defendant has the right to use any of these brakes during the renewal of the patent, which the company may have had on hand at the expiration of the first fourteen years, and even to repair them till they wear out.

But the complainant insists that the defendant has no right, by virtue of said eighteenth section, to proceed after the expirarion of the first fourteen years to make brakes to be used on the company's road, and whether the defendant has this right is exactly the point in controversy.

There is no decision of the Supreme Court which seems to us to favor this claim of the defendant. On the contrary, several decisions of that court seem to be against it. The case of *Wilson vs. Rosseau*, above referred to, certainly is unfavorable to it. Indeed, in that case several of the judges held that the right of an assignee, for the first term of the patent, to use the thing patented was not available under a subsequent renewal of the patent, unless such right under that renewal was plainly given by the terms of the assignment.

It is true that a majority of the court held otherwise, though with some hesitation. And in the opinion of the majority strong language is employed, strictly confining the assignee

[1] *Wilson vs. Rousseau*, 4 Howard, 646.

to the right to use the thing patented, and more than intimating a doubt whether he could make it. In referring to the eighteenth section of the patent act, the court says: "The clause is as follows: 'And the benefit of such renewal shall extend to assignees and grantees of the right to use the thing patented to the extent of their respective interests therein.' It will be seen that the word 'exclusive' used to qualify the right of a grantee, in the eleventh section, and, indeed, always when referred to in the patent law, and also the words 'to make' and 'to grant to others to make and use' are dropped, so that not only no exclusive right in the grantee, in terms, is granted or secured by the clause, but no right at all—no right whatever —to make or to grant to others to make and use the thing patented. * * * * The clause, therefore, in terms, seems to limit studiously the benefit or reservation, or whatever it may be called, under or from the new grant, to the naked right to use the thing patented."[1] This ruling in *Wilson vs. Rousseau* was afterward approved in the case of *Simpson vs. Wilson*, 4 Howard, 709.

The same doctrine was adhered to in *Wilson vs. Simpson*, 9 Howard, 109. And Mr. Justice Wayne, in delivering the opinion of the court in that case, said that the decision in *Wilson vs. Rousseau* "does not permit an assignee of the first term of a patent, after its renewal and extension, to make other machines."

The subsequent cases of *Bloomer vs. McQuewan*, 14 Howard, 539; *Chaffee vs. The Boston Belting Company*, 22 Howard, 217; *Bloomer vs. Millinger*, 1 Wallace, 340—all recognize and approve the same doctrine.

The doctrine established in all these cases is that an assignee of a patent, holding at the expiration of the first term a right during that term to make and use the thing patented, may, during the time of its subsequent extension, continue to use it and even repair it for use; but that he cannot make it for use or for any other purpose.

[1] *Wilson vs. Rousseau*, 4 Howard, 660, 681.

It is true that in the cases in the Supreme Court referred to there was a remarkable diversity of opinion among the judges; but that diversity had no reference to anything favorable to the defense in this case. It seems to have arisen solely from an opinion on the part of a minority of the judges, that the assignee of a patent for its first term had no right even to *use* the thing patented, after the expiration of that term, unless the assignment by its terms gave him that right, and this circumstance may well admonish us not to extend this right to the thing patented.

Counsel for the defendant seem virtually to admit that if, in this case, there had only been the purchase of a right to make and use one of these brakes, the right would have been gone when that brake was worn out. But they earnestly argue that when, as in the present case, the right is granted to make and use an indefinite number of them, without any limitation except as to locality, it substantially amounts to a grant to use the invention in order to construct brakes, as well as the right to use the brake so constructed. There would be plausibility to this argument if applied to a *process* patented; for example, to a process by which several ingredients are so combined as to produce some valuable chemical result. For in such a case the right assigned would not be the right to make a machine and use it, but the right to use a process. A process is not *made*, but *used*. But the case at bar involves no question concerning process; it only touches the right to make and use machines. And we cannot see how the eighteenth section of the patent act, when applied to the right to make and use one machine, should receive a construction different from what ought to be given to it when applied to the right to make and use an indefinite number of machines.

Counsel for the defense called our attention to the case of *Daly vs. The Union India Rubber Company*, 3 Blatchford, 489, as supporting their view. The things patented in that case were a process and machinery for the manufacture of India rubber goods—at least the learned judge held that it embraced both a process and machinery. And he decided that the assignee of the first term of the patent had the right to avail himself of

the thing assigned during the term of the renewal of the patent, whether the patent was to be construed as being for a process and a machine to be used in such process, or for a process alone, or for a machine alone, and whether the machinery used by him was or was not in existence prior to the commencement of the extended term. In thus concluding, Judge Hall's argument is ingenious and able, although to us not very convincing. He concludes that "if the only right to use were one which resulted from the purchase and ownership of a machine, the right to use it is co-extensive with the existence of such machine, and necessarily expires with it." He admits that his view of the question is in conflict with the reasoning of the Supreme Court in *Wilson vs. Rousseau.* But he insists that reasoning is mere *dicta*, and does not bind him. We are not sure that the reasoning in that case was *dicta* only. We can hardly regard the language of Mr. Justice Nelson, which we have cited from that case, and that of Ch. J. Taney in *Bloomer vs. McQuewan*, as mere *dicta.* But whether in this we are right or not, we regard the reasoning of these eminent judges on the point under consideration as sound, and adopt and follow it. Were there no precedents of the Supreme Court on the questions before us, we might be disposed, though reluctantly, to follow the decision in 3 Blatchford, 489. But believing, as we do, that the Supreme Court has settled the very point in question, we must follow the decision. We think the construction given by that court to the eighteenth section of the Patent Act is plainly this: That every assignee of the right to use the thing patented has the same right to use it during the period of its renewal that he had during the first term of the patent; but that he had no right, after the expiration of the first term, to make the article patented, arising out of an assignment executed before the renewal, and not expressly giving him the right to make it after the renewal. The rule thus settled by the Supreme Court seems to us to be a reasonable one; and it has the advantage of being a very plain and practicable rule. We cheerfully follow it; and we are the more disposed to do so because Judge Story in *Woodworth vs. Sher-*

man, 3 Story, 171, has decided that an assignee under an original patent does not acquire any right under an extension of it, unless such right is expressly conveyed to him by the patentee; and because it is well known that Justices McLean, Wayne, Woodbury and Thompson agreed with Judge Story on that point.

Upon the whole, therefore, we are of the opinion that in the making and using of the brakes, so made since the expiration of the first term of the patent in question, by the defendant, the complainant's rights have been infringed; and that for this infringement he is entitled to recover damages, and to have a perpetual injunction. But forasmuch as we are not able, from the data now before us, to determine accurately the amount of the complainant's damages, we refer the matter to the master to ascertain in the proper way, and to report the amount of damages which the complainant ought to recover.

In the investigation of the questions here decided, I have consulted Associate Justice Davis, and he fully agrees with me in the views above expressed.

In re WIGGERS.

DISTRICT COURT.—NORTHERN DISTRICT OF ILLINOIS.—NOVEMBER, 1868.

IN BANKRUPTCY.

1. JUDGMENT FOR TORT,—is discharged under the Bankrupt Law.
2. RELEASE FROM ARREST.—A bankrupt arrested under a *ca. sa.* issued upon such a judgment will be released by this court, even though the state court had refused so to do.
3. JURISDICTION EXCLUSIVE. The jurisdiction of the District Court is exclusive, and its authority paramount, and it will protect the bankrupt in the manner contemplated by the law.
4. As to arrest, there is no distinction between *mesne* and final process.

Thomas had recovered a judgment for a tort against Wiggers in the state court. On the 18th of May, Wiggers filed his petition in bankruptcy, scheduling this judgment. On the 23d, Thomas sued out of the state court a *capias ad satisfaciendum* on his judgment, under which Wiggers was arrested on the morning of the 25th. Afterwards, on the same day, Wiggers was duly adjudicated a bankrupt by the register. The state court having refused to release the debtor—holding that the judgment creditor might prove his claim in bankruptcy, or hold the defendant in custody at his election, and that the *ca. sa.* is not a "civil action," nor included in the clause for the prevention of arrest—this application was made for an order to discharge the debtor from arrest.

Spafford & McDaid, for creditor.

Hervey, Anthony & Galt, for bankrupt.

DRUMMOND, J.—The only question is as to the true construction of the last clause of the 26th section of the bankrupt law.

This judgment was recovered for a tort, but it is still a debt, because it has passed into judgment. It is clear that the bankrupt law intends to discharge the debtor from debts or judgments obtained for a tort, as well as on simple contracts. Otherwise it would have placed them among the exceptions in the section.

There is no distinction between an arrest on *mesne* and final process. To be sure, before judgment, this claim is, as it were, *in fieri*, and after judgment it becomes *res adjudicata*; but so far as arrest is concerned the intent and object of this clause in the bankrupt law are the same.

The fact that an application has been made to the state court cannot be considered as final and binding. The main point is whether this law is paramount, and whether it is the duty of this court to see that a suitor within its jurisdiction is protected in the manner contemplated by law. This law gives exclusive jurisdiction to this court, and declares in what manner proceedings shall be instituted and continued. It was obviously the object of the law to bring the bankrupt at all times within the control and disposition of this court, and the state courts cannot have control over the bankrupt in a manner different from that authorized by the law itself.

Debtor discharged.

See *In re Book*, 8 McLean 317, and *Comstock vs. Grout*, 17 Vermont, 512. [*Reporter.*

In re CLARK.

DISTRICT COURT.—NORTHERN DISTRICT OF ILLINOIS.—DECEMBER TERM, 1868.

DISCHARGE OF INVOLUNTARY BANKRUPT.

1. An involuntary bankrupt may be discharged unless some act specified in the 29th section is proved against him.
2. His estate having been administered upon, and the object of the Law having been fulfilled, if he has acted in good faith there is no reason why he should be compelled to go through the vain ceremony of filing a voluntary petition.

Application by involuntary bankrupt for discharge.

DRUMMOND, J.—In this case the register of the first district has certified to the court that there is no opposition to the discharge of the bankrupt by any creditor, and that he is entitled to his discharge provided it is competent in law to discharge an involuntary bankrupt.

I understand, also, that doubt has been expressed on this point in other quarters, and I have therefore examined the question. It is rather singular that the bankrupt law nowhere refers in express words to the discharge of an involuntary bankrupt, but I think that the necessary conclusion from the whole law is, that the fact of the applicant being an involuntary bankrupt should not of itself alone prevent his discharge.

The 42d section declares, that "the warrant shall be directed, and the property of the debtor shall be taken thereon and shall be assigned and distributed in the same manner and with similar proceedings to those hereinbefore provided for the taking possession, assignment, and distribution of the property of the debtor upon his own petition." The object in both cases—vol-

untary and involuntary—is the same, the distribution of the assets of the bankrupt among his creditors in conformity with the modes pointed out by the law.

Undoubtedly, if the act of bankruptcy alleged and proved against the involuntary bankrupt comes within any of the alternatives specified in the 29th section, which prevent or render invalid any discharge, he should not be discharged; but if there be nothing of that kind set forth in the petition by the creditor, nor otherwise shown, I see no good reason why the party should be compelled to go through the vain ceremony of filing a petition himself, to be released from his debts, when his debts and assets have just been administered by the bankrupt court, at the instance of a creditor. For example, under the 39th section, if a debtor shall conceal himself to avoid the service of legal process in an action for the recovery of a debt or demand provable under the act—that would constitute an act of bankruptcy, and authorize proceedings by a creditor against him, but unless that concealment were accompanied with some of the acts or omissions specified in the 29th section it would not prevent his discharge; and so of some other acts of bankruptcy mentioned in the 39th section. Upon principle, if the involuntary bankrupt has acted in good faith, there is no good reason why he should not be released from the payment of his debts upon the surrender of all his property to the assignee, as well as the volunteer; and, though the language of the act touching discharges applies generally if not always to those who have filed their own petition, yet I think the necessary implication is that if the 29th section does not prevent it, the involuntary bankrupt is entitled to his discharge.

It seems to me if Congress had intended to exclude all involuntary cases, without distinction from the relief of a discharge, it would have been clearly expressed.

But there are two words used in a parenthesis in the form of discharge given in the 32d section, which, though it is merely in a form, and the law declares that the form of a certificate may be that in substance, yet would seem to indicate that

the discharge might be as well of the involuntary as voluntary bankrupt: "On which day the petition for adjudication was filed by (or against) him."

There is also, possibly, an inference to be drawn from the language used in the beginning of the 30th section, in favor of the opinion already intimated, by the words "on his own application," and a similar inference may be drawn from parts of the 36th and 37th sections.

On the whole, therefore, I can have no doubt that in a proper case an involuntary bankrupt may be discharged.

This is also declared to be the law in *In re Bunster*, 5 Bankrupt Register, 82. [*Reporter.*

In re CANADY.

District Court.—Northern District of Illinois.—December Term, 1868.

DISCHARGE AFTER A YEAR.

1. A discharge may be granted to a bankrupt on an application made more than a year after the adjudication.

2. The true construction of the 29th section gives the court a discretionary power, and, in a proper case, on explanation of the delay, a discharge will be granted.

The facts appear in the opinion.

Drummond, J.—In this case the clerk has submitted to me an application by the bankrupt for his discharge.

The only objection to the granting of the discharge arises from the fact that the adjudication of bankruptcy was made by the court, on the 5th of December, 1867, and the application

was not presented by the bankrupt till after the 5th of December, 1868.

The question is, has the court power to grant the discharge.

The 29th section of the bankrupt law declares, "That at any time after the expiration of six months from the adjudication of bankruptcy * * * * and within one year from the adjudication of bankruptcy, the bankrupt may apply to the court for his discharge from his debts."

It may be thought the implication here is that no discharge can be granted unless application be made within the year, but I am inclined to think that would be rather a narrow construction of the language. The intention obviously was to promote diligence; but there is nothing which in terms forbids the discharge, if the application is made after the year. The words, it will be observed, are permissive. "The bankrupt *may* apply for his discharge"—not that he *must* or *shall*, within one year, so apply.

It will sometimes happen, from various causes, and without any fault of the bankrupt, that the application may be delayed, and, in such case, it would be hard to withhold the discharge. It seems to me more in accordance with the general scope and meaning of the law to construe this clause of the 29th section as giving a discretion to the court to grant or withhold the discharge, according to the circumstances of each case, when application is made after the expiration of the year. If, in a given case, the delay was the result of gross negligence on the part of the bankrupt, the court might well refuse the application. I think, therefore, that the true rule in the case under consideration is, not to grant the discharge as of course, but to permit the bankrupt by affidavit, petition, or otherwise, to explain in writing the causes of the delay; and that will be the practice adopted in the present case, and if the explanation shall prove satisfactory, the usual notice will be given to the creditors to appear and show cause why a discharge should not be granted to the bankrupt.

UNITED STATES EX REL. J. EDGAR THOMPSON VS. THE BOARD OF SUPERVISORS OF LEE COUNTY, IOWA.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—JANUARY, 1869.

1. CONFLICT OF JURISDICTION.—To a writ of *mandamus* issuing from this court it is not a sufficient answer that the respondents had been enjoined by a state court from doing the act which the writ of *mandamus* commanded.

2. FEDERAL COURTS SUPREME, when acting within their sphere, and wherever they come in conflict with the state courts, the latter must give way.

3. EFFECT OF REVERSAL OF DECISION ON VALIDITY OF COUNTY BONDS.—Where county bonds had been sold upon the faith of decisions of the Supreme Court of the state declaring their validity, the fact that the court afterwards reversed its decision does not invalidate those previously purchased in good faith and before maturity.

4. State courts have not the right to interfere with the process of this court to collect judgments therein rendered on such bonds.

5. Where the United States Circuit Court and the Supreme Court of the state have ruled differently upon the same questions, and the Supreme Court of the United States has sustained the Circuit Court, neither the state courts of that state nor litigating parties can disregard the mandate of the Circuit Court.

6. REMEDY BY MANDAMUS.—A writ of *mandamus* is the proper process against a Board of Supervisors, to compel the levy of a tax and payment of a judgment obtained against the county, in this court.

7. Where the respondents make no return to the writ, or refuse to obey it, this court will issue an attachment.

8. JURISDCTION ON REMOVAL.—Where a suit in the U. S. Circuit Court has been removed to the circuit court in another circuit, the latter court has the same power over the parties which the first court would have otherwise had.

Motion for an attachment against the members of the Board of Supervisors of Lee county, Iowa, for contempt in disobeying a writ of *mandamus* from this court.

The facts appear in the opinion of the court.

Grant & Smith, for relator.

J. C. Hall and *Frank Sample*, for respondents.

DRUMMOND, J.—The facts are these: The county of Lee, Iowa, in pursuance of a statute of that state, and a vote of the people of the county to that effect, issued coupon bonds in aid of the construction of certain railways. A question was made in the courts of Iowa as to the authority of counties under the law to issue such bonds, and it was held by the highest court of the state, in several cases, that such authority existed. These bonds, therefore, had the popular, the legislative and the judicial sanction. The bonds thus fortified, being delivered to the railway companies, were sold in the market, and the relator, among others, became, in the ordinary course of business, a purchaser for value before maturity.

Some of the coupons on bonds held by the relator not being paid, suit was brought thereon in the Circuit Court of the United States for the District of Iowa. Under the law of Congress these suits were transferred to this district, and at the October term, 1864, of this court, the relator recovered three several judgments against the county of Lee, amounting in the aggregate to $8,764.09 and costs. These judgments were unpaid, for the reason, as alleged, that there was no property on which an ordinary execution could operate. In the meantime the Supreme Court of Iowa had reversed its rulings, and had held all these county bonds invalid, as issued without authority of law. And the statutes of Iowa having provided that a tax should be levied by the Board of Supervisors, to pay these bonds and interest, injunctions were issued against these defendants, among others, restraining the levy of such tax. The effect of the overruling of their prior decisions by the Supreme Court of Iowa upon bonds issued and purchased on the faith of the original position taken, has repeatedly come before the Supreme Court of the United States, and it has been uniformly held by

that court that bonds in the hands of a *bona fide* holder, purchased for value before maturity, while the courts of Iowa sustained their validity, were a just claim against the parties issuing them. It has always seemed to me that this doctrine rested upon the plainest principles of right and equity. The bonds were in market, for sale, decided to be good and effectual in law, by every authority that could speak in the state; the money was paid and received. It would be difficult to imagine a contract made under more solemn and binding guarantees. The effect of an injunction issued by the tribunals of Iowa prohibiting the levy of a tax, has also several times recently been before the Supreme Court of the United States, and it has been decided that they cannot, by injunction or otherwise, interfere, in any way, with the appropriate process of the federal courts for the collection of judgments. And in cases like that we are now considering, it is also settled that a *mandamus* is such process.

Such being the state of the case, on the 10th of July, 1868, the relator obtained an alternative writ of *mandamus* from this court, requiring the Board of Supervisors of Lee county to levy a tax to pay off the three judgments and costs recovered by him, or to show cause, on the first Monday of October next thereafter, why they did not make such levy. This writ was duly served on the supervisors by the marshal of Iowa, in the month of September. No cause was shown or apparent notice taken of this writ by the Board of Supervisors, and their default was entered on the 14th of October. On the 29th of October, 1868, the relator obtained from this court a peremptory writ of *mandamus* against the supervisors of Lee county, it having been shown that the levy had not been made, requiring them to forthwith impose and to collect without delay the tax for the payment of the judgments, and in this they were "to fail not, under the peril of the law." On the 10th of November last the marshal duly served the peremptory writ of *mandamus* on the president of the board, and gave a true copy of the same to each member while the board was in open

session. No return has ever been made by the defendants to this writ. On the same day that the writ was served, the board, as appears by the published minutes of their proceedings, on the suggestion "of counsel for Lee county in railroad bond suits," adopted the following preamble and resolutions:

"WHEREAS, a peremptory writ of *mandamus*, issued by the Circuit Court of the United States for the Northern District of Illinois, sitting at Chicago, in the case of the United States *ex rel.* J. Edgar Thompson against Lee county, has this day been served upon the members of this board, commanding the levy of taxes for the payment of a certain judgment in favor of said Thompson and against Lee county, rendered upon certain bonds issued by said county to aid in the construction of a certain railroad; and

"WHEREAS, This board has been heretofore perpetually enjoined by the Supreme Court of Iowa from levying any taxes for the payment of any of said bonds, and the said injunction was in force and duly served upon this board before the said *mandamus* was applied for or issued;

"*Resolved*, That we believe our oaths require us to obey the said injunction, issued by the Supreme Court of Iowa, and duly served as aforesaid.

"*Resolved*, That we are therefore unable to comp'y with the order contained in said writ of *mandamus* without violating the Constitution or laws of Iowa as construed by the courts of Iowa, and also doing violence to our oaths of office as we understand it, and rendering ourselves liable to punishment for contempt and violation of our sworn duty.

"*Resolved*, That we earnestly desire to obey all orders of the courts of our country, and do not wish to be in contempt of any, but, situated as we are, we are compelled to obey said injunction and decline to levy said tax, and to rely upon the justice of our Government and the courts, both state and federal, for protection."

The sixteen members who appear to have been present that day, and who, it will be borne in mind, were parties to this suit, and had been served with process, all save one—and I name

him to his honor, B. S. Merriam—voted for the resolutions. The presiding officer, apparently not being required by the rules in such case to vote, did not vote.

I have given the whole of the preamble and resolutions in order that the defendants may have the benefit of their entire justification; and the substance of it all is this, viz.: that in a matter where they, as citizens of Iowa and the United States, are to decide whether they will submit to the authority of the courts of that state or to the nation, they will yield obedience to the commands of the courts of Iowa, and disregard those of the United States. And they adopted this course after it had been decided by the highest court of the nation, in a similar case, that it was against law, and upon the suggestion of counsel who must at the time have known that the Supreme Court of the United States had so decided.

It was supposed that the dogma contained in the resolutions just cited was exploded by the issue of the late rebellion. But it seems hydra-headed, and we now encounter it within the borders of the patriotic state of Iowa, which struggled as hard as any other state to extirpate it.

It would seem to need no argument to show that the position taken by the Board of Supervisors of Lee county is unsound. If tenable, then the federal courts are enchained by state authority, and cannot execute their own decrees. They act within the states and upon the people of the states. That is the very law of their being. But it is a fundamental principle that within their sphere they are supreme. Whether or not they are in the path pointed out by the Constitution and law depends, by the very terms of the instrument itself, upon the adjudications of the Supreme Court of the United States. Then, when that court, in a given case, has decided that the parties should obey the mandate of a federal court, state courts must yield. This has been the rule from the foundation of the Government, and, therefore, in certain controversies writs of error issue to the highest court of a state to revise its judgment or decree, under the twenty-fifth section of the Judiciary Act of 1789. It is upon the same principle that the act of March

2, 1833,[1] was passed at the time of the South Carolina troubles. The courts of the United States have constantly followed it since their organization. To take a very recent example: The bankrupt law of 1867, in various ways, interferes with the proceedings of the state courts. By what right? By virtue of the power in Congress "to establish uniform laws on the subject of bankruptcy." Whenever, in carrying out this power, the courts of the United States act upon the courts of the states, the latter must give way, and for the simple reason that the authority of the former is paramount. It must be so under our system, for it is very clear, if the doctrine now sought to be maintained by the defendants prevailed generally, the tie that binds the states, in the administration of justice at least, would be severed at once. What, therefore, the defendants are required to do in this case is nothing new. State courts and judges have done it often, and because they believed their oaths of office required it under the sixth article of the Constitution, which declares that the laws of the United States "made in pursuance thereof * * * shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

The mandate issued from this court is a law to these defendants, expressly decided so by the Supreme Court of the United States. The judges of Iowa are bound to obey and respect it. On what higher ground can the Board of Supervisors of Lee county, in that state, place themselves to escape its binding obligation.

It is the undoubted right of the courts of Iowa, in suits therein, to decide all legal questions properly coming before them under the constitution and laws of that state, and the parties thereto are concluded by such decision; but when they decide differently, in different cases, upon the same point, and the Supreme Court of the United States has adopted one course of decisions and rejected the other, neither the courts of that state nor the parties to controversies in the courts of the

[1] 4 U. S. Statutes at Large, 634.

United States, can ignore or disregard the judgments of the federal courts, merely because they suppose the right ruling has not been followed.

It has sometimes happened that the Supreme Court of the United States has overruled its own previous decision, made in accordance with the judgment of a state court, in order to follow the guide there set up, but it is obvious that there must be a limit to such deviations, and that court has frequently failed to see sufficient reason for the change. These cases from Iowa furnish one instance where it has refused to adopt the last decision of a state court.

It is true there was not complete harmony of opinion among the judges of the Supreme Court of Iowa, nor has there been among the judges of the Supreme Court of the United States, upon the question in controversy between these parties, but that is not uncommon. It is a difference of opinion upon the law among lawyers and even judges that gives rise to most it not all of the litigation in our courts. Courts are created to settle these differences and adjudicate on the rights of parties. Many of the rules now of daily practice in the courts of the United States have been established, not by a unanimous court; of which much of the jurisdiction in admiralty is an example. It is a maxim of the law that the public interest demands there should be an end of legal controversy, and, therefore, when the decision of a competent court of final resort in a case within its jurisdiction is given, as to that, the door is closed.

I infer from an opinion which has just been published of the Supreme Court of Iowa, and which I suppose to be authentic, the judges of that court intend to adhere to its later rulings on the validity of these county bonds. No one can question their right to do so, but it seems to me no intimation even should be given from which it could be inferred that in a conflict in such a case, between the courts of the state and of the United States, the decisions of the state court are paramount.

It is clear that is the view taken of the subject by the defendants, and, it would seem, inspired by counsel and not discouraged by judges. It is inconceivable that these defendants could

have taken their course without some reason for believing that they would be sustained. Indeed, they distinctly say, situated as they are, they rely upon the courts of the state, as well as of the nation, for support. It is difficult to comprehend by what mode of reasoning they reached the conclusion they could rely upon a federal court for protection against the consequences of their own disobedience of its orders; for a court that cannot and will not enforce its decree is shorn of one of its principal attributes. The judgments of the relator would become valueless without the means of compelling payment, and when he asks for any appropriate and legal process to effect that result, the court ought not to withhold it. If there had been any steps taken to remove the case to the Supreme Court of the United States, to the end that questions of so much doubt, and about which there has been so great a difference of opinion at the bar and on the bench, might be re-examined, then, perhaps, there would be some grounds for declining to act. But nothing of the kind has been attempted. The parties have contested, unsuccessfully, all these points so often before the courts of the United States, that they have abandoned further controversy in argument, and now hope to interpose as a shield the order of a state court. As has been seen, such order is of no avail, and the hope, to every one who can examine the subject unaffected by feeling, must appear to be founded on a mere fallacy. Other cases, similar to these now under consideration, were transferred from Iowa to this state some years since, because of the alleged interest of the judges of the Circuit Court of the United States for that district in the questions involved, and thus this court has been connected with the untoward controversy which has arisen between the courts of the United States and of that state, and in which at that time, in order to execute the judgments rendered, the judges of this court were called on to issue a peremptory writ of *mandamus* to parties under injunction from the state court, and though admitting it was an appropriate process, they, under the circumstances, were unwilling to do anything to produce a conflict, and therefore declined to issue the writ; requesting the parties, in the first place, to

go before the courts of Iowa and apply for a removal of an apparent obstacle to the process of this court. But that was not done, or if it were, the application was unsuccessful, and the Supreme Court of the United States has since decided, as has been shown, that the obstacle was not a real one, and that the process should issue and be executed. Upon what principle is it that the judges of this court, administering in these cases under the Constitution of the United States the laws of Iowa, must obey the mandates of the Supreme Court, and the defendants, parties in the very cases where the mandates issue, must not obey them? It would be difficult by any train of reasoning within the scope of ordinary intelligence to name it.

The question has occurred whether before a writ of attachment is ordered a rule to show cause should be served on the defendants. If it did not clearly appear that the defendants had deliberately taken their line and *resolved* to abide the results of a violation of the orders of the court, that course would be adopted. But it is plain from what has been stated that the only cause has already been shown. And it would seem, therefore, that a rule to show cause would serve no useful purpose. The object is to oblige the defendants to obey a lawful order of this court, and if they will do that, there is no desire to impose mere penalty. And besides, as parties to a suit in this court, on their own showing, they are guilty of contumacy. They allege, indeed, that they desire to obey all orders of the courts of the country, and do not wish to be in contempt of any, but an open, willful, deliberate violation of a lawful order of a court, duly served on a suitor, is itself a contempt, and, therefore, while they disclaim the wish to be in contempt, they expressly admit they have committed it. It has been hinted that the officer may be resisted in the service of the attachment, in this case; but though there does not seem to have been that complete acquiescence in the judgments of the federal courts expected by the Supreme Court of the United States, yet it is to be hoped all such apprehensions are groundless, for under the law of Congress this court has precisely the same power over the parties in Iowa as the Circuit Court of that district would have

had if the cases had not been transferred. I am not insensible of the gravity of this case, and have stated, somewhat at length, the reasons upon which the action of the court is based, and with the hope that the defendants may reconsider the circumstances of their position and act in conformity with law. The principles presented are established by the highest judical authority in the country, and indeed are familiar. They have been thus referred to because they seem to be either unknown, forgotten, or repudiated by the defendants and their legal advisers.

In granting the writ of attachment in this case, I submit, in conclusion, whether, after all the various matters involved in this litigation have been repeatedly before the Supreme Court, of the United States, and as often determined against the claims set up by the persons and corporations of Iowa, who are parties to suits in the federal courts, it is not the duty of those parties, at least as to the cases in the courts of the United States, to yield obedience as good citizens, to the orders of the final arbiter of the law.

The decisions of the Supreme Court of Iowa on the question of these municipal bonds are numerous, and many of them are elaborately argued. *Dubuque County vs. The Dubuque and Pacific R. R. Co.*, 4 G. Greene, 1. *The State vs. Bissel*, Id. 328. *Clapp vs. Cedar County*, 5 Iowa, 15. *Ring vs. Johnson County*, 6 Id. 265. *McMillen vs. Boyles*, Id. 304. *Games vs. Robb*, 8 Id. 193. *Stokes vs. Scott County*, 10 Id. 166. *Whittaker vs. Johnson County*, Id. 161. *The State ex rel. etc. vs. County of Wapello*, 13 Id. 389. *Meyers vs. Johnson County*, 14 Id. 47. *McMillan et al vs. Boyles et al*, Id. 107. *Rock et al vs. Wallace*, Id. 593. *Smith vs. Henry County*, 15 Id. 385. *Ten Eyck vs. The Mayor of Keokuk*, Id. 486. *Chamberlain vs. City of Burlington*, 19 Id. 395. And later, in the case of *McClure et al vs. Owen et al*, 26 Iowa, 243, the Supreme Court of Iowa review the decisions, and deny the binding authority of the decisions of the U. S. Supreme Court on the questions involved.

That *mandamus* is the proper remedy to enforce the judgment, see *United States vs. Treasurer of Muscatine County*, 18 American Law Register, 415. Reported also in 1 Dillon, 522, as *Lansing vs. County Treasurer*.

The doctrine that an injunction from a state court is inoperative to restrain the acts commanded by a *mandamus* from a Federal court is approved in *Riggs vs. Johnson County*, 6 Wallace, 166; *United States vs. Keokuk*, Id. 514.

The decision of the Supreme Court of the United States that bonds issued

while the state courts held that they were legally issued and valid cannot be afterwards invalidated by a change in the decisions by the same courts, was rendered at the December term, 1865, and is reported in 3 Wallace, 327; *Thompson vs. Lee County.*

The Federal courts will not necessarily follow the decisions of the state courts in questions of common law. *City of Chicago vs. Robbins*, 2 Black, 418; *Williamson vs. Berry*, 8 Howard, 495; *Lane vs. Vick*, 3 Howard, 464.

Nor in questions of commercial law. *Swift vs. Tyson*, 16 Peters, 1; *Carpenter vs. Insurance Company*, Id. 495; *Neves vs. Scott*, 13 Howard, 268; *Foxcroft vs. Mallett*, 4 Howard, 353.

The distinction is also made that the Federal courts will not so follow state constructions as to rendered invalid contracts entered into with citizens of other states. *Rowan vs. Runnels*, 5 *Howard*, 134; or where a different construction had become the basis of contracts. *Pease vs. Peck*, 18 Howard, 595.

In the case of *Talcott vs. The Township of Pine Grove*, reported in the American Law Times for April, 1872, p. 66, Emmons, J., gives an exceedingly elaborate review of the authorities in both the state and Federal courts on several of the questions involved in this case.

The Supreme Court, in the case of *Olcott, vs. Board of Supervisors of Fond du Lac County*, which was a suit upon county bonds, recently decided, and reported in Chicago Legal News, May 17, 1873, has ruled that a decision of the State Supreme Court that the bonds were invalid, the act under which they were issued being unconstitutional, was not binding upon the Federal courts; that if a contract is valid under the constitution and laws of a state as expounded by its judicial tribunals at the time, no subsequent action by the legislature or judiciary can invalidate it; and that bonds issued in aid of a railroad when such purposes were construed to be for the public good, and to warrant the imposition of taxes, a subsequent decision that no taxes can be imposed for such purposes cannot affect the rights of *bona fide* holders.

Consult also *Leffingwell vs. Warren*, 2 Black, 599; *Cohens vs. State of Virginia*, 6 Wheaton, 264; *Carroll vs. Carroll*, 16 Howard, 275; *Mitchell vs. Burlington*, 4 Wallace, 270; *City vs. Lamson*, 9 Wallace, 477. [*Reporter.*

UNITED STATES vs. THIRTY-FIVE BARRELS OF HIGHWINES, &c.

DISTRICT COURT.—NORTHERN DISTRICT OF ILLINOIS.—JANUARY, 1869.

DISTILLERS' BONDS, BOOKS AND TAX.

1. When a distiller has given the bond required by the 7th section of the act of July 20th, 1868,[1] in regard to excise duties, which bond has been approved by the assessor, the neglect to file the plans and descriptions prescribed in the 9th section does not bring him within the penalty of the 7th section for failure to give the bond required by law.

2. It was the duty of the assessor to see that the preliminary things were done, and, after he had passed upon the bond, the distiller was justified in proceeding upon the belief that the requirements of the statutes had been complied with.

3. Under the clause requiring that he should "make and execute a bond in form prescribed by the Commissioner of Internal Revenue," until a form had been prescribed, it was sufficient for him to give a bond in the form and with the condition contained in the statute.

4. Under the 19th section, directing the keeping of books etc., the distiller is bound, even though the Commissioner has prescribed nothing as to the form, to keep books showing the facts prescribed by the statute; but, to bring him under the penalty, the failure or omission to keep books and make the proper entries must be *with intent to defraud*—which intent the prosecution must establish affirmatively.

5. The payment of the tax prescribed in the 59th section is not a condition precedent to commencing business, and the penalty is not incurred until after assessment, demand and refusal.

Information for a forfeiture against thirty-five barrels of highwines, the property of Geo. P. Frysinger, and seized in his distillery at Rock Island, for alleged violation of the Revenue Laws.

The facts further appear in the charge.

Jesse O. Norton, U. S. District Attorney, for the United States.

[1] 15 U. S. Statutes at Large, 125.

Wm. C. Goudy, *George C. Bates*, and *Leonard Swett*, for defendants.

DRUMMOND,, J.—This is a proceeding under the act of July 20th, 1868, which is entitled "An act imposing taxes on distilled spirits and tobacco, and for other purposes." It is the first prosecution that we have had in this court under this act. A seizure was made by the collector of the fourth district, of certain property used for the purpose of distilling, and thereupon an information has heen filed in court, which alleges certain causes of the seizure. Those causes are set forth in the law as reasons for a seizure.

The seventh section of the law provides that every distiller should, on filing his notice of intention to continue or commence business with the assessor, before proceeding with such business, after the passage of the act, make and execute a bond in the form prescribed by the Commissioner of Internal Revenue, with at least two sureties to be approved by the assessor. The penal sum of the bond was to be not less than double the amount of tax on the spirits that could be distilled in the distillery for fifteen days, and in no case was to be less than the sum of $500. The condition of the bond was to be that the principal should faithfully comply with all the conditions of the law in relation to the duties and business of distillers, and should pay all liabilities incurred, or fines imposed upon him for a violation of any of the said provisions; and some other conditions were annexed.

The first of the reasons set forth in this information is that George P. Frysinger, who was running the distillery which was seized, and using the property therein for the purpose of distilling, carried on that business, and failed to give the bond required by law.

The question to be determined under this part of the information is, whether he carried on the business of distilling without giving the bond required by law.

The ninth section of the law declares that every distiller and person intending to engage in the business of distilling shall,

previous to the approval of his bond, cause to be made, etc., an accurate plan and description of the distillery, etc. It is true that the assessor could require this to be done, and it was the duty of the distiller to do that which the the ninth section imposed upon him before the bond was approved; but the information is not for a violation of the ninth section, but for a violation of the seventh section, namely, the failing to give the bond required by that section. Has the claimant been guilty as charged in this part of the information?

The evidence on this point is substantially this: That on the 2d day of September, 1868, Mr. Frysinger applied to the assessor, giving notice of his intention to run his distillery, and also delivering to him a bond, in the penalty of $18,000, with certain parties as sureties, which bond, the assessor says, was satisfactory to him. The language of the assessor, Moses M. Bane, is: "Frysinger delivered to me, also, a bond which was satisfactory to me." The assessor also says that, whilst at Rock Island, where he was when this bond was delivered to him, he telegraphed to the Commisioner of Internal Revenue, stating in substance that two distilleries at Rock Island, one of them Frysinger's, had, as he understood it, complied with the law, and inquiring whether they could then start their distilleries; that to this dispatch a reply was received on the next day, saying that they could not; that, on receiving the reply, he informed Mr. Frysinger that before starting he must await further orders from the assessor; that he informed Frysinger that when the bond was approved, he having already complied with the other requisites of the law, as he understood it, he would, in three days after such approval, be authorized to commence operating his distillery, and would be taxed from and after three days after the approval of said bond; that on the 15th day of September he wrote the following letter, addressed to the Commissioner of Internal Revenue: "I send herewith plans and surveys of the distilleries of Terence Maguire and George P. Frysinger, in Rock Island county. Their bonds will be approved on the 21st instant, and on the third day thereafter they will be charged as distillers, under the act of

July 20, 1868, unless orders to the contrary are received from your office. Very respectfully, M. M. Bane, Assessor." Having received no instructions from Washington, on the 21st day of September, 1868, he wrote the following letter, by his clerk: "George P. Frysinger, Esq., Rock Island: Sir: Your bond, as a distiller, under the act of July 20th, 1868, was approved to-day. Very respectfully, M. M. Bane, Assessor."

It seems to me if those facts are established to your satisfaction, it can hardly be said that he failed to give a bond as required by law.

It is to be observed that this is a proceeding against Frysinger's property. He must have done some act which would cause a forfeiture, and thereby affect his pecuniary interest. He could only act under the information which was before him. No objection was made by the proper officer whose duty it was to receive and approve the bond. On the contrary, when it was handed to him on the second day of September, he said it was satisfactory to him; no criticism was made upon the form of the bond, penalty, security, or anything of the kind. Mr. Frysinger had been notified that when he received information that his bond was approved, he might proceed with his work, and that he would be assessed within three days thereafter. He was so notified and, therefore, it can scarcely be said, under this state of facts, about which there is no controversy, that he failed to give a bond as required by law.

What did the law require which he had not done? It may be said that the law required him to do certain things under the direction of the assessor, in relation to his distillery, before the latter should approve of his bond, but he had given the bond, he had been notified that it had been approved, and after all this was done it would seem hard to forfeit his property because then he had not done what the officer whose duty it was to pass upon his bond had declared officially that he had done.

If the court or jury could see that in the giving of the bond he had failed to comply with the law, or had given intentionally a different bond from what the law required, there would be some ground for claim of forfeiture of the property,

because then the bond required by law had not been given; but, as I understand, nothing of this kind is shown or claimed. Whether, in point of fact, the bond had been approved or not, it seems to me, is immaterial; it would be the grossest injustice to forfeit a man's property because the assessor had failed to do that duty which he had informed him had been done—namely, the approval of the bond; as to him the bond was approved.

Again, the seventh section declares that the bond should be in such form as was prescribed by the Commissioner of Internal Revenue, and it does not appear that he had, up to this time, prescribed any form. Admit that to be so. The only effect of that, as I conceive, is this: that whenever the Commissioner of Internal Revenue did prescribe a form of bond, then it would be the duty of the distiller to give it in that form, and until he did so prescribe, it was sufficient if the distiller gave a bond in the form and with the condition contained in the statute, and that was received by the competent officer, and the notification of its approval given to him.

So much for the first clause of seizure, as set forth in the information.

The second clause is, that the claimant, being a distiller, after the 20th of July, omitted to provide the books required by law, in which were to be set down his business transactions, with intent to defraud the United States.

The nineteenth section provides that every distiller should from day to day make, or cause to be made, true and exact entry in a book or books to be kept by him, in such form as the Commissioner of Internal Revenue may prescribe, of the kind of materials, and the quantity of pounds, bushels and gallons purchased by him for the production of spirits, from whom and when purchased, and by what conveyance delivered, etc. This was to be done, also, in the form prescribed by the Commissioner of Internal Revenue. It does not seem that any form was prescribed, and the court has held, heretofore, and now holds, that even where the Commissioner of Internal Revenue does not prescribe the form, that does not excuse

the distiller from providing books and making therein the entries demanded by law. The only effect of it is, that the Commissioner of Internal Revenue may prescribe the form. When he does, that form is to be followed.

It is conceded that, as to this cause alleged in the information, the books were not provided, and entries were not made as required by law. The only question under this part of the information is whether this omission on the part of the claimant was with the intent set forth in the specification, namely, to defraud the United States.

That is an affirmative fact, which it is necessary for the prosecution to establish. It is not enough that he failed to provide and make the proper entries in the book; that failure and omission must be with the intent to defraud the United States. If the intent is wanting, then this cause alleged in the information, falls as a proper cause for seizure.

The third cause alleged in the information is that the claimant, as a distiller, after the 20th of July, did not pay the special tax required by law.

The position taken by the District Attorney is, that the fifty-ninth section of the law, that the following special taxes shall be and are hereby imposed, that is to say distillers producing one hundred barrels or less of distilled spirits, counting forty gallons of proof spirits to the barrel within the year, shall each pay four hundred dollars, &c., * * * and that this payment was a condition precedent to the commencement of the business of distilling; in other words, that before a distiller could operate his distillery he must pay a tax of four hundred dollars.

The question is, whether that is a fair interpretation of the law.

Considering the severe penalties that are imposed by this law for the non-payment of the special tax, that it may involve not only a forfeiture of property but a loss of liberty, I think no court ought to construe it so strongly against the party to be affected by it, except on the construction of the language itself. I must say that I have failed to find that clear, unmistakable language in this law, to indicate that the distiller,

before he starts his distillery, should go to the office and pay the $400, without a word being said to him, without any levy or assessment or demand, or anything of the kind. It would be competent, undoubtedly, for the law to require it. It would be competent for Congress to impose such severe penalties, but unless the language of the statute is not capable of any other construction, I do not think that the court ought to draw such a conclusion from it. It may be that it is competent for the proper officer to demand this from a distiller, as a pre-requisite to beginning operations. It may be that it is competent for him, immediately after the distiller has commenced operations, to assess the tax against him and demand it, and on his refusal to pay it that the penalty would follow. But I think, on looking at the language of the law, before such a penalty could be visited upon the property or the person of the individual, that this assessment should be made, and that there should be be a demand also upon the distiller, and a refusal by him.

Nothing like that is shown in this case, and in the absence of anything of the kind being shown, it does seem to me that it would be an injustice to visit either the claimant or his property with such severe penalties.

I think this view of the case derives additional force from the fact that the language of the law as to giving the bond is clear and distinct. The bond must be given before the distiller can commence operations. That is clearly a condition precedent. But here all that the law says is, that the special taxes assessed shall be paid; that they shall be paid as required by law, and, if not, then certain consequences shall follow. Precisely when they shall be paid is not distinctly set forth in the law, and the presumption is, I think, that they are payable when demanded by the proper officer. Besides, the distiller has given a bond adjudged to be sufficient by the assessor, and on that bond he and his sureties are liable as well for all special as other taxes.

The last cause alleged in the information is, in general

terms, that the claimant carried on the business of a distiller with intent to defraud the United States.

So that the information may be divided into two parts: One that the claimant did not file a bond and pay the special tax as required by law; the other, that he carried on the business of distilling, and omitted to provide himself with books, and make the proper entries, with intent to defraud the United States—one being the omission to do what the law required; the other being the doing of certain acts, or failing to do them, with intent to defraud the Government.

A few observations on this fraudulent intent will close what I have to say to you upon the case. Fraud is not to be presumed. It must be established. But it may be established, indirectly, by circumstances, as well as by direct evidence. But those circumstances must necessarily tend to the conclusion that there is fraud. If they do, then they are often as satfactory as positive evidence of the fraud.

In relation to the omission to provide the books as required by law, it would seem, if you believe the testimony of one of the witnesses, that Mr. Frysinger spoke to him about the books, and that witness, who was an officer, told him to go on and keep the books as he had done under the old law. If this be so, it would hardly be contended, I think, that this omission was with the intention to defraud the Government, unless there was an omission to make an entry with that view. If there was, then, as a matter of course, the case is made out, because it might be true that the claimant might not know precisely in what form the books were to be kept; might omit to provide himself with the proper books through ignorance, and yet if he did in point of fact, not knowing what the kind of books ought to be, make entries in the books he had, with intent to defraud the Government, he would be guilty. So that the only thing, as it seems to me, that you have to inquire of on this part of the case is whether he has been guilty of a fraud, either in not providing books or in making or omitting entries in the books.

Various circumstances are relied upon by the prosecution as

indicating a fraudulent intent, under the fourth cause set out in the information, that he carried on the business of distilling with such intent. These are the facts—in the first place, that the fermenting tubs did not contain marked upon them their proper capacity; that a portion of the machinery of the distillery was not constructed and located precisely as the law required; that the fences were higher than was required by law; that the proper bar required by law was not placed across the door, and that some of them had not the proper locks.

This cause in the information, standing, as it does, before you, and proof being admitted under it, if there is any proof in the case which satisfies you that the fraudulent intent has been made out against claimant, then it would be your duty under this fourth charge to so say and find for the Government; so that it may be proper for you to consider all these facts that have been introduced in evidence, and determine for yourselves whether the claimant was guilty of fraud. It is not sufficient, that the fermenting tubs or any other vessels in the distillery were wrongly marked; that the proper bars were not put across the doors, or locks supplied; that the fence was not of the proper height, nor that a portion of the machinery was placed different from what the law demanded. All these together are not sufficient; but there must be connected with them a fraudulent intent. Some one of them must have been done or omitted with the intent to defraud the United States, or there ought not to be a verdict for the Government. If, looking at the whole or any part of this evidence, you are satisfied clearly that there was a fraudulent intent, then it is your duty to say so, under this last cause stated in the information.

The jury found for the defendant.

UNITED STATES vs. FURLONG.

District Court.—Northern District of Illinois.—January, 1869.

Under an indictment under the act of 1866, the Government, claiming that a distiller must have used more material and manufactured more spirits than he returned, is bound to prove that such was necessarily the fact, and must exclude any other conclusion.

To sustain the theory that a given amount of material will produce a certain quantity of spirits, it must be shown that this is a necessary and unavoidable inference from the facts proved.

The defendant was a distiller in the spring of 1868. In accordance with instructions from the Commissioner of Internal Revenue, two officers of the Government visited his distillery on each of ten successive days, measured his tubs, and calculated how much spirits he should have made on the theory now incorporated into the act of July 20, 1868,[1] that forty-five gallons of the meal and water combined represented one bushel of grain. This was an indictment for false returns. There was no evidence to impeach the returns other than the above calculations.

Jesse O. Norton, U. S. District Attorney, for the United States.

George C. Bates and *Leonard Swett*, for defendant.

Drummond, J., charged the jury as follows:

There is no question as to the amount of material reported, and the quantity of spirits returned. The questions are: 1st, whether defendant did not use in the distillation of spirits more grain than he reported, and, 2nd, whether he must not have made more spirits than appear by his returns. As to the first, the prosecution claiming that from the nature, character and number of the mashes proved he must have used more material

[1] 15 U. S. Statutes at Large, 125.

than he reported, it is necessary that the testimony exclude any other conclusion than that insisted upon by them.

As to the second—the theory of the prosecution is that every bushel of material must produce and does produce at least twelve quarts of spirits. Various witnesses have testified that a certain quantity of material will generally produce a certain quantity of spirits, but the estimated product of a bushel varies from seven to eighteen quarts. The general effect of the testimony is that the usual product is about thirteen or fourteen quarts, varying according to the character of the machinery, the state of the weather, and other circumstances. The reports of defendant show that he made about nine and a half quarts. If he actually made more than that, or has manufactured more than he has returned, of course he is guilty. The prosecution seeks to draw a certain inference from a given state of facts, and it is incumbent upon them to show that such inference is necessary and unavoidable from the facts proved. They must show that considering the machinery operated by defendant, the material used, and all the attendant circumstances, the product must necessarily have been greater than returned, and must effectually negative any other conclusion.

Verdict—Not guilty.

MASON vs. ROLLINS.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—JANUARY, 1869.

CONSTITUTIONALITY OF LAW ON DISTILLERIES.

The Act of July 20, 1868, regarding distilleries, is constitutional.

POWER OF CONGRESS.—The power vested in Congress by the Constitution to levy and collect taxes, duties, imposts and excise, with the authority to make all laws necessary and proper to carry that power into effect, is absolute, with the single restriction that no rights secured by other provisions of the Constitution shall be violated.

Congress having the power to impose a tax, and to render its collection effectual, if the character of the business is such that the giving of a bond as a condition precedent to commencing business is a proper means of insuring its collection, such a bond may be required.

REGULATING DISTILLERY.—The prohibition of a distillery within 600 feet of a rectifying establishment is not an unwarrantable interference with the use and disposition of property. If a business affords unusual facilities for evading the Government tax, then Congress may prescribe the modes, conditions, and limitations under which that business can be transacted.

DISTRESS WARRANT.—Issued by a government officer is due process of law, and seizure of property under it is within the taxing power of the Government.

RESTRAINING GOVERNMENT OFFICERS.—Although it might be the duty of a court to interfere with the execution of a law imposing unreasonable conditions to the pursuit of a lawful business, yet it will not restrain the officers of the Government from carrying out a law, on the application of a party who simply fears that he may be injured in a business which he proposes to undertake. He must first be pursuing his lawful business and some unauthorized act be done or threatened.

This was an application by Mason for an injunction against E. A. Rollins, the Commissioner of Internal Revenue, and others, officers acting under the Internal Revenue laws.

The bill alleged that the complainant leased a lot of land, near Clintonville, Kane county, in this state, for the term of three years from the first day of September, 1868, together with the alcohol works, etc., thereon. That by the act of Con-

gress of July 20, 1868,[1] grievous and illegal burdens were imposed upon distillers and rectifiers, particularly in requiring a bond, in a large penalty, to be executed before they may proceed with the business; also, in prohibiting the use of any distillery or rectifying establishment within six hundred feet of any licensed distillery. The bill further states, that the fifth and seventh sections of the act of March 31, 1868,[2] were unconstitutional and void, and that, in consequence of the threatened interference of the officers of the Government, the complainant is afraid to commence the prosecution of his business, and is unable to find any one to assist him in carrying it on.

Edward Roby, for complainant.

Jesse O. Norton, for defendants.

DRUMMOND, J.—It will be seen that the object of the bill is to restrain the defendants from carrying out various provisions of the laws referred to, and which are claimed to be an unauthorized interference with the plaintiff in the pursuit of a lawful business. It is not alleged that the plaintiff has done anything except to take the lease, nor that he has been stopped in anything which he has begun.

Under the Constitution, Congress has power to levy and collect taxes, duties, imposts and excise, and also the authority to make all laws necessary and proper to carry that power into effect. It may be admitted that in doing this Congress cannot violate any rights secured by other provisions of the Constitution, but, excepting this restriction, the power is absolute. There is, as will be seen, power to collect the taxes, and that implies the use of all proper and necessary means to make the collection effectual. Property cannot be subject to unreasonable seizures, nor the house or person of a citizen subject to unreasonable searches; nor can he be deprived of his property without due process of law.

As to the first special ground of complaint, requiring a

[1] 15 U. S. Statutes at Large, 125.

[2] 15 U. S. Statutes at Large, 60.

bond as a condition precedent to the commencement of the business of rectifying or distilling: The right of Congress to collect the tax being undoubted, everything that is produced by a distiller or rectifier may be subject by law to the tax. Congress has the right to render the collection of the tax due upon that business or product effectual, and if it is seen that the character of the business is such that irresponsible parties may engage in it, under the direction of capitalists who are in the background, and who thus seek to avoid the proper responsibility which belongs to them, and in this way to render it uncertain that the tax due upon the product shall be made available to the Government, there can be no doubt, I think, that as a means of accomplishing that result, Congress may require a bond of the person who proposes to engage in that kind of business. The question must always be, whether, under the circumstances of the case, it is a reasonable condition, and I cannot say that it is not in this case.

As to the second objection that is made, the existence of a distillery within 600 feet of a rectifying establishment: It is claimed that this is an unwarrantable interference with the use and disposition of property, that the owner has a right to appropriate it in any way to the performance of a lawful business. But, if the kind of business to which the owner wishes to appropriate his property is such as to afford great and unusual facilities for secreting what may be the actual product of a business, and thus to evade the tax which is due to the Government, then the Congress of the United States, within the authority which it has to collect the tax which may be imposed, can prescribe the modes, conditions and limitations under which that business can be transacted; and, if it has appeared by observation and experience that the construction and use of a distillery within a certain number of feet of a rectifying establishment enables those who use the one and the other in the prosecution of their business easily to evade the payment of the tax which is due, Congress may prohibit this mode of doing the business, which affords these great facilities for avoiding the tax.

Experience has shown, I think, that there has been no one thing used in carrying on the distilling and rectifying business which has been so thoroughly calculated to evade the payment of taxes as the construction of these two establishments so near to each other; the ease with which connections could be made between them was such as to enable the owner to conceal from the officers of the Government the amount of the product, and thus escape the payment of the tax. Therefore, as it seems to me, this was a particular mode which Congress had a right to prescribe, in order to make the collection of the tax effectual.

It may be conceded that the question whether a seizure or a search is unreasonable, in the language of the Constitution, is a judicial and not a legislative question; but, still in determining whether a seizure is or is not unreasonable, we have to look at all of the circumstances under which it is made. For example, at first blush, nothing appears more oppressive than for an accounting officer of the Government to strike a balance against a public debtor, and to issue a warrant of distress against his property for the recovery of that balance. It is not a judicial determination; it is not a judicial process by which the property of the debtor, under such circumstances, can be taken for the satisfaction of the debt; but it is an executive process and has been expressly decided to be due process of law within the meaning of the Constitution.[1] It is the taxing power of the Government that interposes, the right to seize and take property for the payment of taxes that is exercised; and this is a potential right. All property of the citizen is subject to the imposition of taxes for the support of the Government and the payment of its debts. The only security the citizen has is under the safeguards that are thrown around the subject by the provisions of the Constitution itself—one of which is that they must be uniform, and they cannot be imposed without a vote of the representatives of the people in pursuance of law. That is the principal security that we have in relation to this tremendous power which the Government has over our property in the right to tax.

[1] *Murray's Lessee v. Hoboken Land, &c., Company*, 18 Howard 272.

I am inclined to think that if Congress should impose an unreasonable condition as a prerequisite to the pursuit of a lawful business, it might be the duty of the courts to interfere with the execution of such a law by the officers of the Government; but where a party comes into a court and asks that the officers of the Government should be prohibited from carrying out various provisions of law which concern the details of a business he proposes to undertake, I think that he cannot ask its interference by injunction, for fear that, in the execution of some of those provisions, a right guaranteed him by the Constitution may be violated. There must be some unauthorized act done in the first place, or threatened. He must be pursuing his lawful business and that business be interfered with, or the prosecution of it threatened with some act of the Government, before the court can interpose.

I do not say—it is not necessary that I should say in this case—that every provision in these various laws is in strict accordance with the Constitution; but I think that before the plaintiff can call upon the court to enjoin the officers of the Government in relation to all, or any of them which it is claimed are unconstitutional, he must first establish that he is pursuing his business, and that some right in the pursuit of that business has been interfered with. In this case, with the exceptions that have been mentioned, nothing of the kind is shown. For this reason, in addition to the others which have been mentioned, the court cannot grant the injunction which has been asked in this case.

THE TUG BROTHERS.

DISTRICT COURT.—NORTHERN DISTRICT OF ILLINOIS.—FEBRUARY, 1869.

IN ADMIRALTY.

1. RULE OF CHICAGO RIVER.—It is the established rule of the Chicago river that a steamer must take the starboard side of the channel.

2. CROSSING AND SIGNALS.—If she wishes to go to port, she must give the proper signal to an approaching vessel, by the whistle; and the fact that a portion of the river is occupied by other vessels, does not make it less her duty to keep the proper side, or give the usual signal before crossing.

3. RATE OF SPEED.—A vessel in the river must run slowly and circumspectly, and though an approaching vessel is on the side of the channel to which she has no right, is nevertheless bound to reduce her speed to avoid a collision.

4. TUG AND TOW.—It is the duty of a vessel in tow of a tug to watch her own course, and also the tug; and if all her hands are making sail, and she cannot be properly managed, she is at fault.

5. Under such circumstances, the view of the helmsman being obstructed, a lookout should be kept.

6. In this case, the tug, the tow and the propeller having each been in fault, the loss was divided among the three.

This was a libel by John C. Maxwell & Co., owners of the schooner Supply, against the tug Brothers and the propeller Lady Franklin, for damages by a collision in the Chicago river; the Lady Franklin having run into the Supply while the latter was in tow of the tug Brothers.

The facts further appear in the opinion.

Miller, Van Arman, & Lewis, for libellants.

Rae & Mitchell, for Propeller Lady Franklin.

H. F. Waite, for Tug Brothers.

The Tug Brothers.

DRUMMOND, J.—The facts in this case are substantially as follows: Very early on the morning of the 4th of October, 1866, the steam tug "Brothers" took the scow schooner "Supply" in tow, just above Wells street bridge, in the Chicago river. The tug proceeded down the river and through the south opening of Rush street bridge, in order to tow the "Supply" into the lake. About this time the propeller "Lady Franklin" was seen approaching the harbor. The tug with her tow went down on the south side of the channel, when seeing two vessels and a tug lying on the south side of the river at a wharf opposite one of the elevators, the "Brothers" took an angling course across to the north side. At this time the hands of the schooner were all engaged in making sail, the wind being north-east. The captain was at the helm. The propeller, meanwhile, was making her way into the river, and when opposite "the knuckle" of the north pier, not far from the "tub factory," a collision occurred between the propeller and the schooner, the latter being struck on her starboard bow. The schooner sunk almost immediately, but was subsequently raised and repaired at a heavy expense. The place where the collision happened seems to have been a short distance east of the east end of the south pier, and not far from the north pier. The morning was fine, but the atmosphere was hazy, and, though early, there was light enough to enable each craft to ascertain the position of the others.

It is insisted on the part of the tug that directions were given to the schooner to follow directly in the wake of the tug, in crossing over to the north side, which was not done, and that the schooner suddenly luffed up to the north side of the channel, and hence the collision.

It is urged by the schooner that she did follow in the wake of the tug as a matter of duty and principle; that if any directions of a special character were given by the tug they were not heard, and that the latter had no right to cross over to the north side in the manner stated. It is claimed by the propeller that she was coming into the river on the north side —her own proper side;—that the tug, without any warning or

asking any permission, suddenly crossed over, right in the path of the propeller, when the latter, though not going more than two or three miles an hour, could not be stopped in time to prevent a collision.

I think the conclusion, fairly deducible from the evidence, is: that the propeller ran into the schooner before the latter had fully got across the river, and while the tug was in the act of taking her course down on the north side of the channel.

The witnesses on the propeller generally declare that she was running under a proper check, and quite slowly; but I think it manifest, from what happened afterwards, that the "Lady Franklin" was not under sufficient control, and that she was running too fast. She had just entered the harbor; it was easy to see that vessels were coming down which she would be likely to meet at once. Now, under such circumstances, it was the rule alike of law and common sense that the propeller should proceed slowly, and with great circumspection. The moment the propeller entered the river her speed should have been reduced to a moderate rate, so that, having proper steerage way, she yet should be under reasonable control. If this rule had been observed in this case, it is apparent the propeller could have been prevented from coming in contact with the schooner, or at least the blow would not have been followed with such serious consequences. It is a mistake to suppose that because the propeller had the right to the north side of the channel in coming in, she was not obliged to reduce her speed at once in view of approaching vessels descending the river, even if it were the duty of the latter to take the opposite side of the channel. The Chicago river is a narrow, winding water course, in the season of navigation much frequented by various craft, and, therefore, great caution is necessary in passing up and down.

Notwithstanding, therefore, what is stated by several witnesses on board of the propeller, I prefer taking the testimony of some of the other witnesses, considering it confirmed by independent facts, and think the Lady Franklin had too much headway on her at the time. If she were running under

a check, as claimed by her officers, it was not applied soon enough, or was not strong enough. The propeller, consequently, was in fault.

It is a rule of the Chicago river, understood among seamen, and repeatedly sanctioned by this court, that a steamer must take the starboard side of the channel in ascending or descending. This brings two craft meeting, on opposite sides. If a steamer wishes to go on the port side, the proper signal is given by the whistle to indicate it, and if an approaching steamer on the other side assent, the former can go to port. It is clear that some such rule must be made and observed, in order to prevent, as far as possible, accidents in such a navigation, and it is indispensably necessary that it should be distinctly understood that, when a steamer violates this law it is at its own peril.

In this case no precaution of the kind was taken by the tug, and the circumstance that two vessels and a tug were lying at a wharf on the south side, and thus some portion of the river was occupied, did not authorize the tug Brothers to omit the usual signal, and did not the less make it the duty of the tug to keep the south side. As a matter of practice and observation, we know that as between two openings of a bridge on the river, a steamer sometimes takes in descending, for example, the north opening of the State street bridge and of Rush street bridge, and in ascending, the south opening; but it is settled, and it has been often held in this court, that whenever this is done it is at the peril of such steamer. The tug, therefore, was also in fault. The schooner was in tow of the tug, and to a certain extent under its control as to course, and absolutely as to speed, and though it may often be unnecessary to have a lookout on a vessel when in tow, yet I think, under the circumstances in which the Supply was then placed, there ought to have been a lookout forward to direct the course of the schooner. All the crew were in the act of making sail--their attention was consequently somewhat withdrawn from the immediate course of the vessel. The sails that were being hoisted, it is admitted, obstructed the view of the helmsman.

It is positively stated by the witnesses on the tug that the schooner did not follow in the course of the tug, and notwithstanding this is denied by those on the schooner, I think it is most probably true. The practice is uniform, I believe, for vessels in tow of a tug in the Chicago river, to watch their own course, and not rely absolutely on the tug. A great deal may depend on the extent and fastening of the tow line, but with the ordinary tow line used, the course of the vessel should be attended to with almost as much care as if on her own motion. It seems to me therefore, that it was a fault for the schooner to let all her men be employed in making sail at such a critical juncture. The helmsman was not of himself able to take that comprehensive glance at the condition of the river and lake necessary for the proper management of the Supply. Owing to this, I think, there was not that instant change of course to the north side, in following the tug, that there might have been. It cannot with confidence be asserted that this fault on the part of the schooner did not, in any degree, contribute to the collision. It will then be seen that I consider all the parties in fault.

There is no controversy made in this case about the damages. They amount to quite a large sum; $5,074.22.

There is a question, and, so far as I know, a new one, as to the manner in which they should be assessed. If it were a case of collision between two vessels, neither being in tow of another, there would be no difficulty, where there was fault in both contributing to the collision. In such case, the loss is divided equally between the parties. Here it is somewhat different. It may be said that the tug and the schooner (the one being the agent of the other) constitute one party, and the propeller the other, and that the loss should be divided accordingly. That would make the propeller pay one-half of the loss, instead of one-third. But, on the whole, I can see no sufficient reason why the rule of equality should not apply to a case like this. The schooner, it is true, employed the tug to tow her into the lake, and the relations existing between the schooner and the tug may have been different, in consequence of this

contract, from those which either sustained to the propeller, but the tug was obliged to perform its part of the contract with needful skill and diligence, and, if these were wanting, it was liable to its principal. And in this case it is clear, I think, if the tug had kept its own side of the channel, no collision would have occurred; and, as has already been said, it cannot be asserted that the fault of the schooner did not contribute to the collision. Without, therefore, deciding as to the division of damages in all cases where there may be fault in the steamer and its tow, and in another vessel, producing collision, I am of opinion in this case that it will be equity to divide the loss equally between all the parties. It will therefore follow that a decree will be entered for $1,691.40 against the tug Brothers, and for a similar amount against the propeller Lady Franklin. Each party to pay his own costs.

Decree accordingly.

This opinion was, on appeal to the Circuit Court, affirmed by Davis, J.

A tug with a tow is entitled to half the river, and is not bound to keep close to the pier. She has the character of a steamer—her duty after having exchanged signals with a propeller. *The Alleghany*, Vol. 1. of this Series, p. 497.

As to relative duties of tug and tow, see *Cramer vs. Allen*, 5. do., 248.

As to respective liabilities of tug and tow, see *The Angelina Corning*, 1 Benedict, 109; *The Alabama and The Gamecock*, Id. 476; *The Steam Tug C. Y. Davenport*, 3 Benedict, 63; *The M. M. Caleb*, 4 Benedict, 15; *The Blanche Page*, Id. 186; *The M. A. Lennox*, Id. 190; *The George Farrell* Id. 316; *The Deer*, Id. 352; *The Olive Baker*, Id. 178; *The James A. Wright*, 3 Benedict, 248; *Taft vs. Carter*, 59 Barbour, 67; *Brown vs. Clegg*, 63 Pennsylvania State, 51.

A tug will not be held answerable for damages done by vessels in her tow, unless it be proved that the injury was owing to want of care and skill in the tug in performing the duties belonging to her. *The Steamer Express*, Olcott, 258. [*Reporter*.

AKERLY vs. VILAS.

CIRCUIT COURT.—EASTERN DISTRICT OF WISCONSIN.—FEBRUARY, 1869.

1. REMOVAL FROM STATE COURTS.—Where the application for the removal of a cause from the State to the United States Courts is in proper form, and the facts on which the application is founded are made to appear according to the requirements of the act, the party is entitled to have the cause removed, and the judge of the State Court has no discretion.

2. REFUSAL OF CLERK TO FURNISH COPIES.—Where the clerk of the State Court had, on proper application, refused to furnish a certified copy of the record and proceedings, this court will allow the parties to supply them.

3. NON-RESIDENT CO-DEFENDANTS DO NOT OUST JURISDICTION.—Where in the State Court all the defendants, except some who were residents of the state in which the suit was brought, had confessed the bill, the fact that some of the co-defendants were residents of another state does not prevent this court from taking jurisdiction.

4. APPLICATION—WHEN IN TIME.—An application for removal made after the State Supreme Court had remanded the cause to the State Circuit Court, is made "before the final hearing or trial," and is in time. An order of the State Supreme Court reversing the judgment of the Circuit Court, and remanding the cause for further proceedings, opens the case to litigation as if no judgment had ever been rendered.

This was a motion by the plaintiff, a citizen of the State of New York, for an order allowing him to file in this court copies of the process, pleadings, depositions, testimony and other proceedings in this cause, the clerk of the State Court from which removal was sought having refused to make and certify such copies.

This case had been pending in the Circuit Court of Dane county, which on the 28th of October, 1869, had on petition and papers filed by the plaintiff required the defendant to show cause why the case should not be removed to the Circuit Court of the United States. On the 8th of November the following order was entered: "And the court having heard the counsel

of the parties, and being sufficiently advised therein, ordered and declared that in this action now pending in this court there is a controversy between Jay Camiah Akerly, the plaintiff, a citizen of the State of New York, and Levi B. Vilas, one of the defendants, a citizen of the State of Wisconsin, that the matter in dispute exceeds the sum of five hundred dollars, exclusive of costs; that the plaintiff has made and filed in this court an affidavit as required by the act of Congress, approved March 2, 1867, and in all other respects complied with said act. And it is further ordered, that this court doth accept the surety offered by the plaintiff, and that all proceedings in said cause be and they are hereby stayed, and this cause is hereby removed into the Circuit Court of the United States, in and for the District of Wisconsin." On the 26th day of December, 1868, application was made by the plaintiff to the clerk of the Circuit Court of Dane county for a certified copy of the record and proceedings in this case, for the purpose of transferring it to this court, according to the order of that court, and the bond of the plaintiff, according to law, and the fees of the clerk for making and certifying a copy were tendered, which he refused to accept; he also refused to furnish the copies demanded, stating that he was bound to obey an order of the Dane county Circuit Court, prohibiting him from making such copies. The state court, in addition to the order of removal, had made an order allowing an appeal from said order of removal to the State Supreme Court, and enjoining its clerk from furnishing copies and proceedings pending said appeal.

Finches, Lynde & Miller, for complainant.

Spooner & Vilas, for defendants.

MILLER, J.—This motion is made under section 4, chap. 57, of the act of Congress approved March 2, 1833,[1] which reads: "In any case in which any party is, or may be by law, entitled to copies of the records and proceedings in any suit or prosecution in any state court to be used in any court of the

[1] 4 U. S. Statutes at Large, 634.

United States, if the clerk of said court shall upon demand, and the payment or tender of the legal fees, refuse or neglect to deliver to such party certified copies of such record and proceedings, the court of the United States in which such record and proceedings may be needed, on proof by affidavit that the clerk of such court has refused or neglected to deliver copies thereof on demand as aforesaid, may direct and allow such record to be supplied by affidavit or otherwise, as the circumstances of the case may require or allow, and thereupon such proceeding, trial and judgment may be had in the said court of the United States, and all such process awarded as if certified copies of such records and proceedings had been regularly before the said court." The requirements of removal of causes from a court of a state to a court of the United States, according to the act approved March 2, 1867,[1] are, that a suit must be pending in the state court at the time of the application for removal, in which there is a controversy between a citizen of the state in which the suit is brought, and a citizen of another state, and the matter in dispute exceeds the sum of five hundred dollars exclusive of costs, such citizen of another state, whether he be plaintiff or defendant, if he shall make and file in such court an affidavit stating that he has reason to, and does believe that from prejudice or local influence he will not be able to obtain justice in such state court, may at any time before the final hearing or trial of the suit file a petition in such state court for the removal of the suit into the next circuit court of the United States, to be held in the district where the suit is pending, and offer good and sufficient surety for his entering in such court on the first day of its session copies of all process, pleadings, depositions, testimony, and other proceedings, etc. And it shall be thereupon the duty of the state court to accept the surety and proceed no further in the suit.

The state court was satisfied that all the requirements of the act were complied with by the plaintiff, and on inspection of the record found that there had not been a final trial or hearing of the suit. The court then accepted the surety offered, and

[1] 14 U. S. Statutes at Large, 558.

ordered that all proceedings in the suit be stayed. In the twelfth section of the Judiciary Act is the same provision in respect to the surety upon an application for the removal of causes from state to United States Courts, that it shall be the duty of the state court to accept the surety and proceed no further in the cause. The Supreme Court of the United States in *Gordon vs. Longest*, 16 Peters 97, decided, that when the application for the removal of a cause is in proper form, and the facts on which the application is founded are made to appear according to the requirement of the act, the party is entitled to a right to have the cause removed under the law of the United States, and the judge of the state court has no discretion to withhold the right. And when on application for the removal, it is shown that the case is one embraced by the act, and that the party has complied with the required conditions, it is the duty of the state court to proceed no further in the cause, and every step further taken in the case, whether in the same court or in an appellate court is *coram non judice* and of course nugatory.[1] Submitting to the authority of the act of Congress, and of the decisions of the Supreme Court of the United States, I have no other discretion than to decide, that the clerk of the Circuit Court of Dane county was not justified in withholding the transcript from the plaintiff, either under the prohibition of the court, or by reason of the appeal, after acceptance of the surety, and the order of removal of the cause to this court.

I will dispose of the remaining positions of the defendant's counsel, the same as upon a motion to remand the cause to the Dane Circuit Court.

It is objected that all the defendants are not citizens of the state of Wisconsin. Levi B. Vilas, and Esther G. Vilas, his wife, are the principal party defendants. They are the parties to the mortgage in suit. It is alleged that Martin T. Vilas, one of the defendants, is a citizen of the state of Vermont, and is the owner of the equity of redemption of the mortgaged premises. Thomas Reynolds and Leonard J. Farwell, the

[1] Kanouse vs. Martin, 15 Howard, 198.

remaining defendants, are citizens of this state. It is set out in the petition for removal that the persons named as defendants except Levi B. Vilas and wife, have been either personally served with process issued in the cause, or have voluntarily entered their appearance, and that all the defendants except Levi B. Vilas have by the rules and practice of the court confessed and admitted the plaintiff's cause of action, by not answering the complaint of plaintiff, as required by law and rules and practice of the court. The state court finds that in this action now pending there is a controversy between Jay Camiah Akerly plaintiff, and Levi B. Vilas, one of the defendants. From this it would seem that the allegation of the petition, that the complaint had been taken as confessed against all the defendants except Levi B. Vilas is correct. The service and appearance of those defendants may possibly require them to appear and answer a new bill to be brought in this court, or in default of an answer to let the bill be taken as confessed against them. But whether such be the practice or not I need not now determine. At the final hearing a question may be raised, whether a decree can be made irrespective of these defendants. At present they do not appear to be necessary parties.[1]

Another objection to the removal of the cause to this court is, that the application was not made "before the final hearing or trial in the state court."

It appears from a report of the case in 21 Wisconsin 88, that the suit is for foreclosure of a mortgage given by Levi B. Vilas and wife to secure the payment of certain bonds; that the cause came on to be heard between the plaintiff, and Vilas the defendant, and a decree was rendered against the plaintiff, the court holding that the bonds and mortgages were invalid, from which decree the plaintiff appealed to the Supreme Court. And the defendant also appealed for alleged error of the court in striking out his counter claims and rejecting evidence in support of them. The Supreme Court decided, that the bonds and mortgages were valid, and that one of the counter claims

[1] Wood vs. Davis, 18 Howard, 467.

was improperly stricken out, and reversed the judgment of the Circuit Court on both appeals. The cause came on a second time to be tried before the Circuit Court, when a decree was rendered in favor of plaintiff, from which defendant Vilas appealed, upon the ground of the rejection by the court of a certain counter-claim set up in his answer. The Supreme Court reversed that judgment or decree and remanded the cause to the Dane Circuit Court for further proceedings according to law. If the cause had been finally determined by either judgment of the Circuit Court, or by order of the Supreme Court, then the application for removal would not have been filed before "the final hearing or trial." But the last order of the Supreme Court, reversing the judgment of the Circuit Court and remanding the cause to that court for further proceeding according to law, opened the whole case to litigation, the same as if no judgment had ever been rendered. The Supreme Court in effect ordered a *venire facias de novo*, which required the Circuit Court to hear the cause as it no hearing or trial had taken place. The whole proceedings were *in fieri* when the petition for removal was presented to the Circuit Court. I am therefore of the opinion that the petition was presented before the final hearing or trial of the cause.

The motion of plaintiff is granted.

At the September term of the U. S. Circuit Court, present, Justice Davis and District Judge Miller, a motion of defendants for an order rescinding the above order was denied.

The opinion of the Supreme Court of Wisconsin in this case will be found in 24 Wisconsin, 165.

That the state court has no discretion, a proper petition being filed, *Matthews vs. Lyall*, 6 McLean, 18; *Fisk vs. Union Pacific R. R. Co.*, 6 Blatchford, 362.

And no action of the state court can effect the right. *Hatch vs. Chicago, Rock Island and Pacific R. R. Co.*, 6 Blatchford, 105.

After judgment rendered in the state court and exceptions have been overruled in the appellate state court, the case cannot, pending a motion for a new trial on the ground of excessive damages, be removed into the federal court. *Bryant vs. Rich*, 106 Massachusetts, 180.

Consult also *Kingsburg vs. Kingsbury*, June, 1871, to appear in subsequent volume of these Reports, where it is held that where the decree of the court below was reversed by the Supreme Court of the State with instructions to

dismiss the suit, an application for removal came too late; that it was not the intention of Congress that a party dissatisfied with the rulings of the state courts might have a rehearing in the federal courts.

Where in a proper case the necessary steps are taken for removal, the state court has no further jurisdiction, and any subsequent steps are *coram non judice* and void. *Bell vs. Dix*, 49 New York, 232.

For proper practice where the plaintiff persists in proceeding in state court consult *Id.*

Where the defendant, a citizen of another state, regularly files his petition and bond in the state court, in accordance with the provisions of the Judiciary Act, for the removal of the cause to the U. S. Circuit Court, the state court is *ipso facto* ousted of jurisdiction, any further proceedings are *coram non judice* and void. *Stevens vs. Phœnix Ins. Co.*, 41 New York, 149. [*Reporter.*

In re PRINCETON.

DISTRICT COURT.—DISTRICT OF WISCONSIN.—FEBRUARY TERM, 1869.

IN BANKRUPTCY.

A creditor accepting a chattel mortgage with reasonable cause to believe his debtor insolvent, and such act being declared an act of bankruptcy, cannot, by relinquishing his mortgage, become entitled to prove his debt.

This was a motion on behalf of the general creditors of Thomas Princeton, the bankrupt, to expunge the proofs filed by certain mortgagees, on the ground that the giving and receiving of their mortgages was a preference, and a fraud on the bankrupt act.

Finches, Lynde & Miller, for creditors.

J. M. Gillett, for mortgagees.

MILLER, J.—The petition of creditors against this debtor represents as the cause of bankruptcy that he, being insolvent and unable to pay his debts and with intent of giving preference

to certain creditors therein named, made seven chattel mortgages of his entire stock of goods. It is also shown that the aggregate amount of the mortgages exceeds the value of the goods; and that an agent of the mortgagees was in possession and had advertised the goods for sale at auction, when the marshal took them under a warrant issued on this petition.

Adjudication of bankruptcy against the debtor being made, on reference before the register to take proof of debts, objection was taken to the proof of the debts of the several mortgagees. The register suspended proceedings and certified the matters for the opinion of the judge.

The objection to the proof of those debts is founded on the following provision in section 39 of the bankrupt act: "If such person (the debtor) shall be adjudged a bankrupt the assignee may recover back the money or other property so paid, conveyed, sold, assigned or transferred contrary to this act; *provided*, the person receiving such payment or conveyance had reasonable cause to believe that a fraud on this act was intended and that the debtor was insolvent, and such creditor shall not be allowed to prove his debt in bankruptcy."

The bankrupt act being founded upon a principle of equity and just distribution among creditors forbids an insolvent debtor parcelling out his estate to preferred creditors. It is so rigid in this particular as to provide in section 35, that where a sale or transfer of property by an insolvent debtor is not made in the usual and ordinary course of business, the fact is *prima facie* evidence of fraud.

The act also imposes upon creditors, in regard to their debts, duties and even forfeitures. In this case a debtor notoriously insolvent made seven chattel mortgages of his entire stock in trade to secure creditors; and an agent of those creditors being placed in possession of the mortgaged property was about to dispose of the goods at auction when the marshal seized them under the warrant. The mortgages are *prima facie* evidence of a fraudulent intent on the part of the debtor, but they may not be *per se* of such intent on the part of the creditors. If a mortgage be given to a preferred creditor, without his knowl-

edge as is alleged on the part of some of the mortgagees, or if a creditor upon receipt of knowledge of such preference repudiates it, the prohibition or penalty of the law in respect of his debt is not to be enforced against him. The act only prohibits the proof of a debt where the preferred creditor "had reasonable cause to believe a fraud on the act was intended, and that the debtor was insolvent." The prohibition is clearly applicable in this case to the debts of those creditors who had reasonable cause to believe that their debtor was insolvent when they accepted the mortgages, or attempted to enforce them by a sale of the property.

It is alleged on the part of some of the preferred creditors, that they surrendered their mortgages, and should be allowed to prove their debts under the following provisions in section 23 of the act: "Any person who, after the approval of this act, shall have accepted any preference, having reasonable cause to believe that the same was made, or given by the debtor contrary to any provision of this act, shall not prove the debt or claim on account of which the preference was made or given, nor shall he receive any dividend therefrom until he shall first have surrendered to the assignee all property, money, benefit or advantage received by him, under such preference." It will be observed that the mere acceptance of a preference by a creditor does not preclude him from proving his debt or receiving dividends. In addition to such acceptance, the creditor must have reasonable cause to believe that the preference was made or given by the debtor contrary to a provision of the act, that is as in this case, that the debtor was insolvent. And in such case under the 39 section the assignee may recover of the preferred creditor the property received, or its value. Under sections 23 and 39, where a creditor accepts a preference with reasonable cause to believe that his debtor is committing a fraud upon the act, he is barred from proving his debt or receiving dividends unless he make return of the matter so received, and on failure to do so he may lose both and all benefit from the preference and dividends of assets.

The phraseology and intent of sections 23, 35 and 39 are

different. Section 23 provides that any person who, after the approval of the act, shall have accepted any preference having reasonable cause to believe, etc. Section 35, declaring void preferences and fraudulent conveyances, and limits the time of prohibition to four and six months. These provisions of the act prohibiting preferences to creditors are general directions for the administration of the act upon the principle of equity. Section 39 prescribes the several causes of involuntary bankruptcy as frauds, and authorizes proceedings against the debtor at the instance of creditors. It is made a cause of bankruptcy for an insolvent debtor to prefer a creditor in any manner therein stated. And if the debtor shall be adjudged a bankrupt, the assignee may recover back the money or property received by the preferred creditor, provided such creditor receiving such preference had reasonable cause to believe that a fraud on the act was intended, or that the debtor was insolvent, and such creditor shall not be allowed to prove his debt in bankruptcy. This prohibition as to the creditors is predicated on the adjudication of bankruptcy upon the allegation in the petition against the debtor. And the creditor having reasonable cause to believe the alleged violation of the act by the debtor, is considered a participant in the offence against the act, and is therefore prohibited from proving his debt in bankruptcy. The act requires proceedings in cases of involuntary bankruptcy to be prosecuted at great expense, and it seems just that the creditor who knowingly encourages or aids a debter to commit a fraud on the act to the prejudice of the other creditors should be deprived of benefits under the act. It cannot be permitted to a creditor who, with reasonable cause of knowledge, has participated in such fraud on the act as to found a proceeding against his debtor, to relinquish his intended preference, and claim to prove his debt under the 23d or any other section of the bankrupt act.

A chattel mortgage is a *conveyance* of property, and when given by a debtor supposed to be insolvent is presumed fraudulent, under section 39 of the act. *In re Colman*, 2 Bankrupt Register, 172. A creditor who receives a chattel mortgage to secure a debt, from a debtor whom he has good cause to believe insolvent, is not entitled to prove his claim. *Ib.*

In re Princeton.

A creditor who takes a preference contrary to section 39 cannot prove his debt in bankruptcy if his debtor is adjudged a bankrupt within six months thereafter on the petition of a creditor. *In re Walton*, 4 Bankrupt Register, 154. The clause in section 39 which prevents certain creditors from proving their claims is construed to apply to those cases only in which the assignee is compelled to resort to legal proceedings to recover the property. By voluntarily surrendering the property he ceases to be a party to the fraud, and his proof is admissible. *In re Davidson*, 3 Bankrupt Register, 106; *in re Montgomery*, 3 Bankrupt Register, 108; *in re Scott & McCarty*, 4 Bankrupt Register, 139; *in re Hunt & Hornell*, 5 Bankrupt Register, 433; *contra Bingham vs. Richmond*, 6 Bankrupt Register, 127; *same vs Frost*, 6 Bankrupt Register 130.

Until judgment or decree, a preferred creditor may surrender, and his right to prove his debt against the bankrupt's estate and to receive dividends will be revived. *In re Kipp*, 4 Bankrupt Register, 190.

Where the fraud is only constructive, and not actual, the creditor should in equity have a reasonable opportunity of considering whether he will surrender his preference, and pay all the costs and charges; but his decision must precede the final decree. The entry of the final decree may be suspended for a brief period to give him such an opportunity. *Hood vs Karper*, 5 Bankrupt Register, 858. [*Reporter*.

PROCEEDS OF THE LADY FRANKLIN.

DISTRICT COURT.—NORTHERN DISTRICT OF ILLINOIS.—MARCH TERM, 1869.

IN ADMIRALTY.

DISTRIBUTION OF PROCEEDS.

1. The lien under a claim which could be enforced against a vessel by the state law follows the proceeds of a sale made to satisfy a maritime lien.

2. It is the duty of this court to distribute the proceeds to the parties entitled to them under the law, state or federal, and parties who might have perfected their liens under the state law, had not the issue come into the admiralty court, are entitled to priority out of the proceeds.

The Lady Franklin was, during the year 1868, the property of the Lake Michigan Transportation Company, a corporation of the State of Michigan. Several seamen employed on board during the season of navigation of 1868, filed libels in this court for the payment of their wages. A decree was entered ordering the sale of the propeller, and she was sold by the marshal on the 25th day of January last, for the sum of $9,500, and after paying the seamen their wages, there was a surplus remaining in court of about $7,000.

Several parties who, during the season of navigation of 1868, had furnished the propeller with supplies, materials, machinery, etc., upon the order of the master, and while upon the navigable waters of this state, then filed a petition in this court against the proceeds in the registry, claiming under the state law a lien upon the proceeds, and although admitting that under the general maritime law they had no lien for which they could enforce their claims in this court, they insisted that, the propeller having been sold under a maritime lien by decree of the court in admiralty, they were entitled to a preference under the state law out of the proceeds. The transportation company

having, meanwhile, been adjudicated bankrupt by the District Court of the United States, in the Western District of Michigan, the assignee resisted these claims and answered the petition.

The statute of the state under which the petitioners claimed their liens reads as follows: "Boats and vessels of all descriptions, built, repaired or equipped, or running upon any of the navigable waters within the jurisdiction of this state, shall be liable for all debts contracted by the owner or owners, masters, supercargoes or consignees thereof, on account of all work done, supplies, or materials furnished by mechanics, tradesmen and others, for, on account of, or towards the building, repairing, fitting, furnishing or equipping such boats and vessels, their engines, machinery, sails, rigging, tackle, apparel and furniture; and such debts shall have the preference of all other debts due from the owners or proprietors, except the wages of mariners, boatmen and others employed in the service of such boats and vessels, which shall first be paid."

Sections 2 and 3 provide for the issuing and return of an attachment.

Section 6. "No creditor shall be allowed to enforce the lien created under the provisions of this chapter, as against, or to the prejudice of any other creditor, or subsequent incumbrancer, or *bona fide* purchaser, unless suit be instituted to enforce such lien as provided in this chapter, within three months (afterwards by amendment extended to nine months) after the indebtedness accrues or becomes due, according to the terms of the contract." Rev. Stat. 1845, p. 71; Gross' Statutes 1871, p. 39.

Rae & Mitchell, for petitioners.

S. W. Fuller, for assignee.

DRUMMOND, J.—The question for decision is whether these petitioners are entitled to a preference of payment as against the original creditors of the bankrupt; in other words, whether the fund, which is in court, should be turned over to the

assignee in bankruptcy, to be distributed under the order of the court in bankruptcy for the benefit of the general creditors, or whether it should be paid over to these claimants to the extent of their demands, by this court.

There is no controversy but that, if the propeller Lady Franklin had remained, without any proceedings, in the admiralty court at the time that the claimants filed their claims against the proceeds, they would have been entitled under the law of the state to proceed by attachment and perfect their lien, or priority of payment under that law, against the Lady Franklin, and, according to the view which the court takes of the question, that substantially concedes the right, on the part of the claimants, to be paid out of the fund in court; because it is the duty of the court to distribute the proceeds to the parties who under the law, state or federal, are entitled to them. For instance, if the owner, whom the assignee in bankruptcy in this case represents, had made application to the court that the proceeds should be paid over to him, in the absence of any conflicting claim an order would have been made, of course, that the money should be so paid. And so it would be in the case of a mortgage, or any other valid subsisting claim upon the propeller. As soon as the court is satisfied of the existence of such claim, the money is, of course, paid in conformity with the rights of the parties.

In this case, these parties proceed against the fund in this court, instead of against the propeller under the state law, and the court, being satisfied that under the state law they would have been entitled to a lien, or a priority of payment, this court must recognize their right when proceeding against the proceeds as against the owner, and in the case, as has already been stated, the assignee substantially represents the owner, the Michigan Transportation Company.

This principle decided by the court is in accordance with the rule laid down in the cases of *Zane vs. Brig President*, 4 Washington, 455; *The Ship Packet*, 3 Mason, 334; *The Stephen Allen*, Blatchford and Howland, 175; and *Andrews vs. Wall et al*, 3 Howard, 568.

An order will therefore be entered that from the fund in court the respective claimants be paid according to their priority.

As to distribution of surplus see also *The Skylark*, *post p.* 251. *The Grace Greenwood*, *post p.* 131, and cases there cited.

Where a surplus remains in court, after a sale in admiralty, a party having a lien or appropriation of the vessel precedently legally fixed, may claim a distribution of such surplus, although his original demand was not such as could be proceeded for in admiralty. *Harper vs. The New Brig*, Gilpin, 536; *Bracket vs. The Hercules*, Id., 184.

In a recent case, *Francis vs. Barque Harrison*, 1 Sawyer (9th Circuit), 353, it is held that the lien of domestic material-men will be preferred to the demand of a subsequent mortgagee against proceeds in the registry. [*Reporter.*

CHAMBERLAIN vs. ECKERT.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—APRIL, 1869.

To a suit on a promissory note, defendant pleaded in abatement the pendency of a suit in the state court; plaintiff replied that since the filing of the plea, the suit had been dismissed.

Held—A good replication.

This was a suit upon a promissory note. Defendant pleaded in abatement that at the time of commencement of this suit an action was pending in the Circuit Court of La Salle county upon the same note, and between the same parties, which action was still pending. Plaintiff replied that on the 6th of March, after the filing of the plea in abatement, but before the replication, the suit in the state court had been dismissed. Defendant demurred to replication.

J. Milton Peters, for plaintiff.

Elliott Anthony, for defendant.

DRUMMOND, J.—I am inclined to think that this replication ought to be held good; and, in the absence of any express authority to the contrary, I shall so hold. There is an opinion given by Chief Justice Parsons, proceeding on the ground that a suit pending at the time of the commencement of the second suit is a good plea; but this, I think, is not the present doctrine. At any rate, it is not the doctrine in this state; and I think it ought not to be because, when a suit has once been commenced, and is dismissed, the fact that it was pending at the time the second suit was brought is no reason why the court in which the second suit was commenced should not go on and adjudicate on the rights of the parties, because, although there was a difficulty once, it is removed. When the suit was commenced there was an obstacle in the way. When the plea was pleaded there was the same obstacle. But now, when the replication is filed, that obstacle is removed.

Demurrer to replication overruled.

Plea of *lis pendens* in another state not good. *Smith vs. Lathrop*, 44 Pennsylvania State, 326, and cases there referred to. [*Reporter*.

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or take any action in relation to the case, leave must have been granted by the court. The proper judgment of the court would follow upon the demurrer, as a necessary consequence. It is known, however, that as a general thing the court is very liberal in the exercise of its discretion and allows a demurrer to be withdrawn and issues of fact to be taken. But in this case no rejoinder was put in, but the defendant demurred to the declaration. I have however, as it is a question of jurisdiction and might come up hereafter, examined the declaration. It is upon an assigned promissory note, and avers that the plaintiff is a citizen of Vermont, and that the assignor of the note is a citizen of Missouri, and that the defendant is a citizen of Illinois. I am satisfied that the court has jurisdiction of the case.

The ground taken by the defendant is, that it must appear upon the face of the declaration, where an action is brought upon a promissory note by an assignee, that the assignor could have brought suit upon the note before he assigned it. The question is, whether that is correct?

The clause in the eleventh section of the judiciary act is: "Nor shall any district or circuit court have cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange."[1]

The question is, to what time does the language "might have been prosecuted" apply. Does it apply to the time when the assignor held and owned the promissory note, or to the time when the suit is brought? If a promissory note is made by a citizen of Wisconsin to a citizen of the same state, and as such assigned by him to a citizen of New York, at the time that the assignor held the note he could not bring a suit in a federal court of Wisconsin, against the maker, because he was a citizen of the same state with the maker; neither could the assignee, a citizen of New York, bring a suit in the federal court of Wisconsin, while the assignor remained a citizen of Wisconsin, but

[1] 1 U. S. Statutes at Large, 78.

if the assignor ceased to be a citizen of Wisconsin, then, as I take it, a suit could be brought in the federal court of Wisconsin, by the assignee and holder of the note, because, then, being in the position as "if no assignment had been made," he, a citizen of New York, could bring a suit. The assignor, who had ceased to be a citizen of Wisconsin, could, while he was holder of the note, bring suit in the federal court of Wisconsin, because he had changed his residence and his citizenship, and become a citizen of another state.

But if the rule contended for by the defendant is the true rule, then no change in the *status* of the payee, after the assignment, could ever enable a party to bring a suit, and it might happen, where the note was executed by the maker to the payee of another state, and at the time of the commencement of the suit in the federal court, he was of the same state with the maker, the suit could be maintained by the assignee, a citizen of another state, because you have to look, according to the view of the defense, to the *status* of the parties at the time that the assignor held the note. And if he ever could have prosecuted the suit, the assignee could prosecute it, although at the time when the suit is brought the payee and maker are citizens of the same state. That would be the necessary consequence, and the question recurs; what does the language of the statute mean, "unless the suit might have been prosecuted in said court, if no assignment had been made?"

I think it means at the time the suit was prosecuted, so that if it appears then that the assignor could have maintained the suit if no assignment had been made, the assignee being a citizen of another state, can maintain the suit.

The only authority mentioned contrary to this view is to be found in the cases of *Rogers vs. Linn*, 2 McLean, 126, and *Fry vs. Rosseau*, 3 McLean, 106. I admit that those two cases seem to imply that the question is, what is the *status* of the assignor at the time he held the *chose in action*, the promissory note. But these cases are not very fully reported, and apparently proceed upon an erroneous view of this clause of the eleventh section of the Judiciary act. It should be observed, however,

that the attention of the court was not drawn to the distinction between the *status* of the assignor at the time he was the owner of the note and at the time the suit was brought. It does not seem that point was at all considered by the court, in order that the proper discrimination might have been made, and therefore I cannot say but that if the attention of the court had been directed to the point which is now presented, it might have used different language from that we find in the reported cases.

In this case, admit that the maker and payee were citizens of Illinois. The plaintiff, a citizen of Vermont, sues in this court. Now what is his *status*? Suppose there had been no assignment of this promissory note. It appears upon the face of the declaration that the assignor at the time the suit was brought could have maintained an action in this court, in the contingency named. He is averred to be a citizen of the State of Missouri, so that the language of the act, (unless the suit might have been prosecuted in such court if no assignment had been made,) applies to him. It cannot be pretended that when a note is made by a citizen of one state to a citizen of the same state that the payee cannot remove to another state and after he has so removed and become a citizen thereof, bring a suit in a federal court against the maker in the district where he resides. That can scarcely be claimed. So that the maker and the payee both being citizens of Illinois at the time this note was made, by the removal of the payee, LeRoy D. Dewey, to Missouri, he certainly could have maintained a suit on this note against the maker in the federal court of the district in which the maker resides, if no assignment had been made, and that being so, this plaintiff can maintain the action. The opinion now given accords with one reported some years since. *Thaxter vs. Hatch*, 6 McLean, 68.

A further illustration may be suggested by considering the time of the maturity of the note. If the maker and payee of the note sued on, in this case, were both citizens of Illinois when it was made, then the right of the assignee to sue in this court would depend, if I understand the argument of the

defendant, upon the fact whether the payee was a citizen of Missouri when the note matured and was the owner, and so himself had the right to sue; in other words, that the payee must have first become a citizen of Missouri and allowed the note to mature before assignment, for both must concur to enable the assignor to sue in this court. And this, I think, demonstrates the error of the argument, because the claim is, if the payee, after the maturity of the note and after the assignment, became a citizen of Illinois at the commencement of the suit by the assignee, the court would still have jurisdiction, whereas, according to my reading of the statute, the fact that the assignor of the note is a citizen of Illinois at the commencement of the suit, would be fatal to the jurisdiction of the court.

The motion must be sustained and demurrer stricken from the files.

Where a judgment has been rendered in a state court between citizens of different states, and the judgment has been since assigned to a citizen of the same state as the original plaintiff, the circuit court has jurisdiction to sustain a bill in equity in favor of the assignee, although the original ground of the suit, on which judgment was rendered, was a negotiable chose in action, on which the circuit court could not have held jurisdiction under the restrictive clause of the eleventh section of the judiciary act of 1789. *Dexter vs. Smith*, 2 Mason, 303.

If the payee change his domicil to another state *bona fide*, before maturity of note, he or his indorsee in such state may sue in the federal court. *Kirkman vs. Hamilton*, 6 Peters, 20; *Catlett vs. Pacific Insurance Co.*, 1 Paine, 594. Jurisdiction having once attached is not divested by change of domicil of one of the parties *pendente lite*. *Morgan's Heirs vs. Morgan*, 2 Wheaton, 290; *Mollan vs. Torrance*, 9 Wheaton, 537; *Dunn vs. Clarke*, 8 Peters, 1; *Clarke vs. Mathewson*, 12 Peters, 164; *United States vs. Myers*, 2 Brockenbrough, 516. [*Reporter*.

THE GRACE GREENWOOD.

DISTRICT COURT.—NORTHERN DISTRICT OF ILLINOIS.—APRIL, 1869.

IN ADMIRALTY.

DISTRIBUTION OF PROCEEDS.

1. In the distribution of proceeds after the sale of a vessel under a decree of this court, parties having liens under state laws are entitled to payment in preference to the owner.

2. MORTGAGE—RECORDING.—The meaning of the first section of the act of July 29, 1850, is that any mortgage upon a vessel, recorded as therein prescribed, shall take effect and be binding upon all parties.

3. Such a mortgage properly recorded becomes a binding security, and material-men claiming liens under state laws are bound to respect it.

4. PRIORITY.—The mortgage being prior in point of time should be first paid in full from the proceeds.

This case was submitted to the court upon the following statement of facts:

On the 28th day of December, A. D. 1868, the barque Grace Greenwood was arrested by monition issued out of this court at a suit prosecuted for mariners' wages. On the 22d day of February, A. D. 1869, the barque was sold by the United States marshal, and brought the sum of seven thousand, three hundred and seventy-five dollars. After paying admiralty liens there remained in the registry remnants and surplus. Against these remnants and surplus mortgagees filed a petition claiming the funds by virtue of two mortgages, amounting in all to some three thousand four hundred dollars ($3,400). There were also petitions of material men filed against the same funds. There was not a sufficient sum to pay all. The mortgagees claimed priority over the material men.

The mortgages were made and executed in Chicago, where the mortgagees and mortgagors then resided, and were recorded at the office of collector of customs, and nowhere else. The mortgages were due and unpaid. All the petitioners were residents of the State of Illinois, except F. W. Myers, Stephen B. Grunmer, E. D. Trotridge, Thomas Adams and Samuel C. Carter. The vessel was owned, enrolled and licensed in the state of Illinois, and registered in Chicago. The claim of Doolittle and Alcott, shipwrights, was for articles furnished on or before April 18, 1868; of the claim of Finny and Lyons, ship chandlers, $861 was furnished prior to April 25, 1868, the balance running up to October, 1868. The mortgages were all recorded before the date of furnishing the supplies.

The question submitted was: Whether the mortgagees had priority and preference over the material-men who resided at the time of furnishing the supplies in the state of Illinois.

Rae & Mitchell, for petitioners.

Barker & Tuley, for mortgagees.

DRUMMOND, J.—The mortgages were made and executed in Chicago, where the mortgagors and mortgagees resided, and were recorded in the office of the collector of customs, but nowhere else. They were all recorded, as I understand, before any of the supplies were furnished, and the controversy arising between the parties is as to the priority of these claims upon the proceeds—whether the material men should be first paid or the mortgagees.

None of these material-men have maritime liens, but as this court and other admiralty courts have decided, although they might not have maritime liens, they could come in and ask for a distribution of the proceeds in preference to the owner; that is to say, before the owner could receive payment of any proceeds remaining in court, those persons who had liens under the state laws, although they might not be of a maritime character, should be paid.

The point is whether the mortgagees are in the same position

as the owner of the vessel, or whether we are to take up these liens or claims in the order of their date, and direct payment according to their priority.

It is to be observed that, in all these cases, the mortgage is given as a security to the party. The mortgagor ordinarily remains in the possession of the vessel. Through him the various claims arise against the vessel. It is so in the case of the owner where there is no mortgage whatever, and, in such case, it seems equitable that the claims which exist against the vessel, and which arise in consequence of his own act, should be paid before he is, when the vessel is sold and the proceeds remain in court. But it seems to me that the same rule cannot hold in the case of mortgagees. Their equity is just as strong as the equity of the material-men, provided it is not an equity which attaches to the thing itself and becomes paramount, both against the owner and against any one who may have a mortgage or other similar claim upon the vessel.

The attention of the court was directed to the case of *The Ætna Insurance Company vs. Aldrich*, 26 New York, 92, which seems to proceed upon the ground that the act of Congress of July 29, 1860, providing for the conveyances of vessels and for other purposes, is not operative as against the creditors of the vessel, where the mortgage has not been recorded in conformity with the law of the state.[1]

But it would seem to follow, as a necessary consequence, from the power of Congress over this species of property, that it could provide for the sale and disposition of it, and for encumbering it, and could declare what would be the effect of a bill of sale, or of a mortgage, hypothecation or conveyance. Otherwise, of course, there would be no meaning in this subsisting right of Congress, neither would there be any in the act of Congress in relation to the mortgage or hypothecation of vessels.

As I understand from the first section of the act of July 29, 1850,[2] declaring "that no bill of sale, mortgage, hypothe-

[1] Taken by writ of error to the U. S. Supreme Court, and overruled. *Aldrich vs. Ætna Company*, 8 Wallace, 491. [*Reporter*.

[2] 1 U. S. Statutes at Large, 440.

cation or conveyance of any vessel or part of any vessel of the United States shall be valid against any person other than the grantor or mortgagor, his heirs and devisees, and persons having actual notice thereof, unless such bill of sale, mortgage, hypothecation or conveyance be recorded in the office of the collector of customs, where such a vessel is registered or enrolled," it seems that if a mortgage is made and so recorded, it shall take effect and be binding as to other parties. Of course, a mortgage as between the mortgagor and the parties connected with him, and parties having actual notice, would be good; but this law declares that it shall not only be good as to them, but as to other parties, and there can be no object whatever in requiring it to be recorded at all, unless it was for the purpose of giving it effect. So it seems to me, the mortgagors and mortgagees living in Chicago, and the *res*, the property, being here, and the mortgage being executed and recorded here with the collector of the port of Chicago, this must give it effect as a valid, binding security upon the property, and one which the claims of material-men, under the state law, and presented as these are, cannot supersede or override.

In this case these material-men have not made their liens available under the state law. They have only declared that if the barque had remained in its original form, unaffected by the proceedings in this court, they could have attached it under the state law, and made their claims effectual against the barque. They come here now and ask that the proceeds shall be treated as the barque itself.

The question is whether in so treating it we are to postpone other subsisting liens upon the vessel, such as these mortgages would be, and such as they were. I think not. It seems to me that we must take up, in their proper order, these claims or liens upon the vessel. Admit that these material-men have a valid claim upon the proceeds, it is no stronger than that of the mortgagees, and inasmuch as theirs is prior in point of time, it is not in fact, so strong and must yield to the claim of the mortgagees, upon the principle that that which is first in time is stronger in right.

In this case I shall direct a distribution to be made in conformity with that principle, the mortgagees to be first paid.

This is believed to be the first case giving the mortgagee's lien a preference over domestic material-men, the practice having been previously the other way. *Reeder vs. George's Creek*, 8 American Law Register, 232; 2 Parsons on Shipping and Admiralty, 149 and notes. Also *The Harrison*, 2 Abbott's U. S. Reports, 74, and notes.

A similar question soon afterwards arose in the Northern District of Ohio. *Scott's Case*, 1 Abbott's U. S. Reports, 336, where it is held that a statutory lien for supplies cannot relate back, so as to take priority over a mortgage recorded prior to the creation of such lien.

The Illinois Supreme Court follows this case of the *Grace Greenwood*. *Bark Great West No. 2*, and *The Propeller Hilton*, both recently decided, and to appear in 57th or 58th Illinois.

The New York Court of Appeals holds that the statutes of that state for the enforcement of liens against boats and vessels, are unconstitutional and void. *In re Steamboat Josephine*, 39 New York, 19; *Shephard vs. Steele*, 38 New York, 52; *Brookman vs. Hamell*, 43 do. 558; *Vose vs. Cockcroft*, 44 do. 415.

If a vessel be sold and the proceeds brought into court, a mortgagee may apply by petition for his distributive share of the proceeds. *Schuchardt vs. The Angelique*, 19 Howard, 239.

Mortgagee entitled to payment as against owner. *Remnants in Court*, Olcott, 382.

Surplus distributed among lien-creditors. *Brackett vs. The Hercules*, Gilpin, 184.

Creditors who could not sustain an original action *in rem* may be paid out of surplus in court. *The Boston*, 1 Blatchford and Howland, 309; *Harper vs. New Brig*, Gilpin 536. Though barred by lapse of time. *The Stephen Allen*, 1 Blatchford and Howland, 175.

Mortgagees are to be paid in priority to material-men, who, at the time of supplying materials, are not in such actual possession of the ship as to give them a possessory lien. *The Scio*, 1 Admiralty and Ecclesiastical R. 353.

By the admiralty law all maritime claims upon a vessel extend equally to proceeds arising from its sale, and are to be satisfied out of them. *The Siren*, 7 Wallace, 152. Consult also *The Skylark*, *post* p. 251. *Proceeds of the Lady Franklin*, *ante*, p. 121.

A claimant for materials or repairs furnished to a vessel in her home port is not entitled to share in the proceeds arising from sale of the vessel in admiralty, as against a mortgagee or assignee in bankruptcy. *The Edith*, 11 American Law Register, N. S., 214.

Since the above decisions, the amendment of May 6th, 1872, to the 12th Rule of Admiralty gives material-men the right to proceed *in rem* against the ship and freight, but its effect upon conflicting claims has not yet been passed upon by the Courts. [*Reporter*.

GAYTES, Assignee, etc., vs. LEWIS.

Circuit Court.—Northern District of Illinois.—April, 1869.

In Equity.

A corporation organized under the Illinois Statute of February 18, 1857, has the power to mortgage its property.

This statute is independent of the act of February 10, 1849.

This was a bill by Carol Gaytes, assignee of the Union Glass Company, bankrupt, to enjoin ——— Lewis from foreclosing a mortgage given to the defendant by the company prior to its bankruptcy.

The facts appear in the opinion.

Asay & Lawrence, for plaintiff.

Hitchcock & Dupee, for defendant.

Drummond, J.—The only question in this case is as to the power of the Union Glass Company to make a mortgage of some property belonging to the company. It is contended on the part of the plaintiff that a mortgage made by the company was invalid, as being *ultra vires*, and not within the authority of the company to make. The question arises under the act of 1849 and the act of 1857.[1] It is claimed on the part of the plaintiff, that the act of 1849 operates upon the company and disables it from making a mortgage.

The second section of the act of 1849 provided that when a company had been created, as provided in the first section, and a certificate had been filed, properly signed and acknowledged, the persons who thus become a body corporate and their successors, should be a corporation by the name stated in such certificate; that they should have succession, sue and be sued;

[1] Gross' Statutes, 1871, pp. 126, 130. Title, Corporations, etc.

have a common seal, "and they shall by their corporate name be capable in law of purchasing, holding and conveying any real or personal estate whatever, which may be necessary to enable the said company to carry on their operations named in such certificate, but shall not mortgage the same or give any lien thereon."

Undoubtedly if this law was binding on the company, it would not have the power of making a mortgage such as was made in this case; but the act of 1857 contains no such restriction. In many respects it seems to be a duplicate of the act of 1849, but in some particulars, the act of 1857 is different; for example, the act of 1849 requires the certificate to be filed in the office of the clerk of the county in which the business was to be transacted. The act of 1857 requires the certificate to be filed in the office of the clerk of circuit court, etc., and there are some minor differences in the two acts; and the second section of the act of 1857 declared that the capital stock of the company should not be less than $10.000, nor more than $500,000; the time of its existence was not to exceed fifty years, and also provided that the capital stock should be fully paid within four years, otherwise it was to work a dissolution of the company, and then the third section declared, "when the certificate, shall have been filed, as aforsaid with the clerk of said court, and a duplicate thereof filed in the office of the Secretary of State, the said clerk shall issue a license to the person who shall have signed and acknowledged the same, on the reception of which they and their successors shall be a body politic and corporate, in fact and in name by the name stated in such certificate, and by that name shall have succession, and be capable of suing and being sued in any court of law or equity in this state, and may have a common seal, and alter the same at pleasure and be capable, in law, of purchasing and holding, conveying and disposing of any such real or personal estate," &c.

Now, it is admitted by the case that the company was organized under this law of 1857. The question is whether the provision contained in the second section of the act of 1849 operated

upon it and continued as a binding condition upon a company organization under the act of 1857. Independent of that, there is no doubt that the language contained in the third section of the act of 1857 would be sufficient to enable the company to make a mortgage. The language is of such a character as in similar cases has been held to imply the power to encumber and mortgage property. "Shall be capable in law of purchasing and holding, conveying and disposing of any such real and personal estate, *choses* in action, and securities, negotiable or otherwise, as may be expedient and necessary to enable the said company to carry on their operations and business, named in such certificate."

Without some limitation upon that language, the necessary construction of it would be that the company would have the power to mortgage and encumber their real property.

I am inclined to think that this law of 1857 must be construed as independent of the law of 1849; that the condition annexed to the law of 1849 did not necessarily follow and operate upon the law of 1857. Therefore, I think the mortgage a valid lien.

Bill dismissed.

In re JOHANN.

DISTRICT COURT.—EASTERN DISTRICT OF WISCONSIN.—APRIL TERM, 1869.

IN BANKRUPTCY.

PETITION BY SINGLE CREDITOR.

The district court will not take jurisdiction in bankruptcy on the petition of an only creditor, whose debt is secured on real estate.

Such creditor seeking to set aside a fraudulent conveyance must follow his remedy by bill in the state court.

A conveyance, even though fraudulent, is not made "in contemplation of bankruptcy or insolvency," there being no other creditors, and this debt being secured.

There is nothing to bring such a case within the scope or intent of the act.

On the 15th day of September, 1856, Nicholas Johann made his note to the Milwaukee and Lake Superior Railroad Company, payable on the first day of July, 1866, with his mortgage on a tract of land as security. The petitioner having become the assignee of the note and mortgage, on the 26th day of September, 1866, instituted proceedings in a court of this state to foreclose the mortgage. In the month of December following a judgment for the sale of the mortgaged premises was rendered, with an order for execution for the residue of the debt against other property of the debtor. The mortgaged premises being encumbered with taxes and tax titles, the proceeds of sale were inconsiderable, when the amount of the residue of the debt was certified and transferred to the judgment record pursuant to a law of the state. The petition in bankruptcy is founded on this judgment. It represents as the cause of bankruptcy, that on the 15th day of October, 1868, Nicholas Johann, the debtor, fraudulently conveyed to his two sons all his estates, lands, and tenements, describing them, with intent to hinder and delay this petitioner in the collection of

his said debt. The conveyances were exhibited at the hearing. The debtor claimed no property except such as is embraced within the exemption laws of the state. No other debt was alleged or proven. The real estate conveyed to the two sons was of greater value than the amount of this debt. Johann was a farmer, and not engaged in trade.

Mariner & Ordway, for petitioner.

Mann & Cotzhausen, for debtor.

MILLER, J.—There is no doubt but a conveyance by a father to his sons, in consideration of his support, is fraudulent as to his creditors, and would be a cause of bankruptcy at the instance of creditors, other than this petitioner. The objects of the bankruptcy act, are discharge of a debtor from his debts, and an equal distribution of his estate among his creditors, in proportion to the amount of their respective debts. This case is not within the scope or intent of the act. There are no creditors to claim distribution of assets. Nor does any creditor allege as cause of bankruptcy these conveyances, but the petitioner who can enforce the collection of his debt by proceedings in equity, in the court where his judgment remains of record. A single creditor, whose debt is secured by a lien on lands of a greater value than the amount of his debt, cannot be permitted to abandon all remedies open to him for the collection of his debt, and claim the jurisdiction of this court in bankruptcy for the purpose. A judgment creditor cannot claim the jurisdiction of the court in bankruptcy for the collection of his debt, fully secured by the only lien on real estate.

It cannot be adjudged that Johann made the conveyances to his sons in contemplation of bankruptcy or insolvency; nor can I find him to be in a state of insolvency while it appears there is property sufficient for the full payment of his only debt, upon the removal of a cloud on the title.

The deeds having been given by the debtor during the pendency of the suit of this petitioner against him should be declared fraudulent, if no legal or equitable consideration be

shown in the proper tribunal. Such a decree cannot be made upon this petition in bankruptcy. If a question of this character should arise at the instance of an assignee in bankruptcy, I would require him to bring his bill in equity.[1]

For these reasons I order the petition dismissed, but without prejudice to proceedings on the judgment.

See *Commercial Bank of Manchester vs. Buckner*, 20 Howard, 108; *Jones on Bankruptcy*, 236; *Perry vs. Langley*, 7 American Law Register (N. S.), 429; *Gassett vs. Morse*, 21 Vermont, 627. [*Reporter.*

THE LADY PIKE.

DISTRICT COURT.—DISTRICT OF WISCONSIN.—APRIL TERM, 1869.

IN ADMIRALTY.

LIABILITY OF TOW IN PASSING BRIDGE.

When a steamboat with three loaded barges in tow, having approached a bridge in fair weather too closely to back or stop, is driven against a pier by a sudden and unexpected gust of wind, the carrier is not liable for loss or injury to the cargo of one of the barges.

The tow being in good order and well manned, the passage of the bridge by similar tows being usual and safe, and no negligence being proved against the carrier, he can avail himself of this defense as within the exception in the bill of lading.

This steamboat was contracted with to proceed up the Mississippi and Minnesota rivers to Shokopee, in the state of Minnesota, with three barges; and there to take on board the barges wheat in bulk, and to transport the same to Saranak, on the first named river, in the state of Illinois. The wheat was put aboard the barges to be delivered in good order, "*unavoidable dangers of the river*" and fire only excepted. Heading down the Mississippi river, the steamboat with the three loaded

[1] *Shawhan vs. Wherritt*, 7 Howard, 627.

barges, two on her larboard and one on her starboard side, and running between piers of the railroad bridge near St. Paul, the larboard barge collided with a pier, and the wheat on board said barge was greatly damaged. The insurance companies having paid the loss, brought this libel. The accident happened about three or four o'clock in the afternoon of April 24th.

Claimants allege in the answer that the steamboat and barges left Shokopee in good order, and proceeded on the trip with all possible care, caution and skill; that when passing through the piers in the usual way, and while in the usual channel for such passage, the steamboat and barges were by a sudden gust of wind blown to the larboard, so that the larboard barge struck the pier on that side and was sunk. It is further alleged that the steamboat and barges were fully and completely manned and equipped, and in all respects river-worthy, and were carefully and skillfully managed at the time of the injury, and that the sinking and consequent loss was an unavoidable danger of the river. The charge in the libel of negligence and improper conduct is denied in the answer.

E. Mariner, for libellant.

Wm. P. Lynde, for respondent, cited *Amies vs. Stevens*, 1 Strange 128; *Hays vs. Kennedy*, 41 Pennsylvania State, 378.

MILLER, J.—There is no doubt from the evidence that the boat and barges were in good order for the service, fully equipped and manned, and in every respect river-worthy. There happened to be on board two captains and also two pilots at the wheel, at the time of the accident, and every man on board was then at his post of duty.

The river was high, with a current at the piers of about three miles to the hour, and nearly in line with the piers. By measurement on the ice the space between the piers was 116 feet, which probably would be increased some at a high stage of water by an inward inclination of the walls of the piers. The tow measured in breadth about 105 feet. The tow was running for the center between the piers, and in a calm would

clear them by about five and a half or six feet. Occasional gusts of wind met the tow through the day, but for an hour before reaching the piers there was a calm, and those on board had no anticipation of wind on approaching the piers. But when within the length of the boat from the piers a sudden gust of wind struck the tow and forced it against the pier and stove the barge. The boat was light, and having but a stern wheel she could not back with the three loaded barges in time to avoid the collision, but was obliged to keep on her course. The rate of speed was then about seven miles an hour. The channel seems to be divided, a portion passing between the piers, which was pursued by the tow, and a portion between the adjoining piers, which is wider, but it is said was not then taken by tows on account of a sunken barge. Other loaded tows passed down in the course taken by this tow in safety; and this tow passed up safely three days before the accident, with the knowledge of the shipper. It is not settled that the current could have caused the collision with the pier. I am well satisfied, that if the piers had been approached by the tow under a high wind the boat should be condemned for unskillfulness of the officers. But there was a calm until the approach to the pier was too close to admit of avoiding the effect of an unanticipated and sudden gust of wind. It is contended that the alleged cause of the collision was an afterthought, as it is not mentioned in the protest. The omission may possibly tend to weaken the force of the testimony on this subject; but it is not probable that such a number of witnesses, including nearly every man on board, would testify to a fabrication. I consider the alleged cause of the collision established by the proof. Libellants insured against the consequences of the collision; but did the contract of the carrier guarantee indemnity to the shipper?

The Supreme Court of the United States in *The Niagara vs. Cordes*, 21 Howard, 8, lay down the position that a common carrier is responsible for every loss or damage however occasioned, unless it happened by the act of God, or the public enemy, or by some other cause or accident, without any fault or

negligence on the part of the carrier, and expressly excepted in the bill of lading. In *Clark vs. Barnwell*, 12 Howard, 272, although the injury to a portion of the cargo may have been occasioned by one of the excepted causes, yet still the owner of the vessel is responsible if the injury might have been avoided by the exercise of reasonable skill and diligence in the storage or care of the goods on the part of the persons employed in the conveyance of the goods. The *onus probandi* then becomes shifted upon the shipper to show the negligence. This case involved exclusively the duty of a master in the stowage and care of the cargo. In *Stainback vs. Rae*, 14 Howard, 532, the collision being considered the result of inevitable accident, neither party was held liable; also, *The Morning Light*, 2 Wallace, 550. Inevitable accident must be understood to mean a collision when both parties have endeavored by every means in their power, with due care and caution, and a proper display of nautical skill, to prevent the occurrence of the accident. *Union Steamship Co. vs. The New York and Virginia Steamship Co.*, 24 Howard, 307. In *New Jersey, &c. Nav. Co. vs. Merchants' Bank*, 6 Howard, 344, 347, 383, it appears to be the understanding that under the exception in this bill of lading it is incumbent on the carrier, in order to relieve himself from responsibility, to prove that due diligence and proper skill were used to avoid the accident, and that it was unavoidable. The carrier must satisfy the court by clear and conclusive testimony that there was no default on his part, and that every reasonable effort was made to avoid the accident. But he is not expected to warrant that his crew is perfect, or that his boat or vessel is perfectly secure, or that he pursued the best course on his voyage. It is sufficient if the crew and vessel are in all respects adequate to the particular duty and service, and that the course taken was used ordinarily and proved to be safe.

I am satisfied that the defense is available to claimants, within the exception in the bill of lading. A carrier is not responsible for the effects of sudden gusts of wind. This is a danger and accident of navigation over which he has no control, and against which his contract contains no warranty. Boisterous

weather, adverse winds, and low tides are beyond the control of carriers on the ocean, and relieve them from responsibility for delay in the voyage, or injury to the cargo. Upon the same principle a carrier should not be answerable for goods lost by tempest or a sudden gust of wind. An act of God relieves the carrier when using due caution and skill.

In the case of *Amies vs. Stevens*, 1 Strange, 128, the plaintiff put goods on board the defendant's hoy, who was a common carrier. Coming through a bridge by a sudden gust of wind the hoy sunk, and the goods were spoiled. The plaintiff insisted that the defendant should be liable, it being his carelessness in going through at such a time. The defendant was held not answerable, the damage being occasioned by the act of God, an extraordinary accident. In *Colt vs. McMechen*, 6 Johnson, 160, where a vessel was heading up the Hudson river against a light and variable wind, and being near shore, and while changing her course the wind suddenly failed, in consequence of which she ran aground and sunk, it was held that the sudden failure of the wind was the act of God and excused the master, there being no negligence on his part. KENT, C. J., concurred in the opinion that the sudden failure of the wind was the act of God, and an event which could not happen by the intervention of man, nor be prevented by human prudence. But he thought there was a degree of negligence imputable to the master in sailing so near the shore under a "light and variable wind," that a failure in coming about would cast him aground. "God caused the gust to blow in the one case, and in the other the wind was stayed by Him." It is well settled that when collison or loss occurs in the absence of fault on the part of the carrier, and under circumstances beyond his control from *vis major*, as from storm, or waves, or reflux of the tide, or lightning, he is not held liable; Abbott on Shipping (Perkins' ed.), 470, and cases cited.

The bill will be dismissed.

See *Elliot vs. Rossell*, 10 Johnson, 1, as to effect of a sudden gust of wind in a dangerous channel, the carrier knowing the dangers of the rapid. Opinion by Kent, C. J. [*Reporter*.

NATIONAL PARK BANK vs. NICHOLS.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—MAY TERM, 1869.

LIABILITY OF SHARE-HOLDERS.

1. It is the duty of a share-holder in a company to examine his certificate, and ascertain his actual position and liability.

2. Circumstances which make a share-holder liable for previously contracted debts, and effect of misrepresentations by agent.

3. Though a subscription be obtained by fraud, the stockholder may waive it by assuming its advantages.

4. If a share-holder assumes the benefits and advantages of a partner, he cannot, when called upon to respond for the contracts of the corporation, deny his liability.

This was an action at law to charge the defendants, nineteen in number, as partners in a joint stock company known as the Butterfield Overland Dispatch Company. The cause of action was an indebtedness of this company, accruing at various times in the year 1865.

The company was organized in March, 1865, under the laws of New York relating to joint stock companies. It was conceded that the legal effect of such organization was to make the associates co-partners. In July, 1865, an agent of the company made application to the defendants to take stock, stating that the company was organized for the transportation of material across the western plains under a charter that would exempt the subscribers from personal liability, and that its capital stock was to be $3,000,000, one-half of which was to be paid in cash.

The defendants engaged to take stock amounting in the aggregate to $250,000, and paid to the agents of the company fifty per cent. of the sum subscribed. In September, certificates of stock were forwarded to the agent of the company in Chicago, and delivered to the defendants. These certificates referred to

the articles of association in general terms, and, it was claimed by the plaintiff, were sufficient to put the defendants upon inquiry as to the mode of organization of the company. On the other hand, it was claimed by the defendants that, supposing that the certificates were in pursuance of the contract of subscription, they did not, in fact, examine them.

It appeared that on November 3d, 1865, all the defendants except Nichols, whose letters were relied on as equivalent executed a power of attorney, as associates, authorizing the organization of the Butterfield Overland Dispatch Company into a corporation, under the laws of Kansas. It was, however, insisted by the defendants that at this time they supposed the company was organized as a corporation.

In the spring of 1866, the company failed, owing very large sums of money, and transferred its assets to the Holliday Overland Mail and Express Company, and issued circulars to its stockholders announcing that they were legally liable to pay in full, as partners, the debts of the concern, calling an assessment of thirty-three and one-third per cent. on the subscriptions, and giving to the subscribers the alternative of taking stock in the Holliday Overland Mail and Express Company, or paying the assessment. All the defendants except Walker, Faucet, Scammon and Martin subscribed and paid for stock in the Holliday Overland Mail and Express Company, under this circular. All the defendants claimed that they had no knowledge, in fact, of the mode of organization, or that there existed a danger of personal liability, until the receipt of this circular, and declined to pay.

It was claimed by the defendants:—

1st. That they were induced to subscribe by fraudulent representations.

2d. That their subscription was, in any event, upon condition that the company should be organized under a charter, and with a fixed cash capital.

3d. That they could not be made liable by relation upon contracts made or debts accruing prior to their coming into the association.

On the part of the plaintiff it was insisted that if there was fraud in procuring the subscriptions, or if conditions were attached to them, yet,—

1st. The fraud or condition had been waived.

2d. That the defendants, by their acts, were estopped from setting up such fraud or breach of conditions.

3d. That the defendants, in legal effect, became partners by relation to the date of the articles of association.

The facts relied upon as a waiver or estoppel were:—

1st. The receipt and retention by the defendants of the certificates with their recitals.

2d. The execution of the power of attorney, with its recitals authorizing the organization of the company under the laws of Kansas.

3d. The receipt of the stock of the Holliday Overland Mail and Express Company.

4th. Various letters from several of the defendants, which, it was claimed, admitted their membership.

S. A. Goodwin and *I. N. Arnold*, for plaintiff.

Charles Hitchcock, *Wirt Dexter*, *Corydon Beckwith*, and *Geo. C. Bates*, for defendants.

DRUMMOND, J., charged the jury as follows:

This is an action by the National Park Bank of the city of New York, against the defendants, as partners in a joint stock company called the Butterfield Overland Dispatch Company; and the question is, whether as such partners they are liable for the claim of the plaintiff, consisting of moneys advanced to that company during the year 1865. The advances commenced on the 21st of April, and ended in November. It depends upon the fact whether these defendants were members of that company in such a way as to make them liable as partners of the company for the whole or for any part of these advances.

You will remark, that the plaintiff was not a party to many of the transactions which have passed in review before us in the evidence; that has related chiefly to the connec-

tion of the defendants with this company, and the manner in which they were induced to give it their names and money. With that it does not appear that the plaintiff as a corporation had anything to do. That was an act, apparently, of some of the members of the company called the Butterfield Overland Dispatch Company, and as between them and these defendants it must be admitted that there have been faults on both sides.

The leading fault with those in New York connected with the Butterfield Overland Dispatch Company, and one which cannot be excused, was the concealment of the fact that they, on the 20th day of March, 1865, commenced the formation of this joint stock company, and completed it by signing and acknowledging the articles of association, on the 12th day of April, 1865, containing stipulations by which they were bound, and by which it appeared it was an association under the sanction of the laws of New York.

Now it was the duty of all these men, or of any of them, in seeking for associates, to let them know distinctly what had been done, and what was the compact to be entered into by any one who was to become a party to the association called the Butterfield Overland Dispatch Company; and if they sought subscribers to their articles of association in Chicago, it was their duty to make known to these subscribers what their articles of association were. The primary thing to be established was their connection with the association; it was, therefore, indispensable that all who were to be connected with it should know its nature and character. But the various gentlemen who approached these defendants upon the subject of becoming parties to this company, did not communicate to any one of them, so far as we know, that there were articles of association signed, and which became operative by their terms, and which recognized that they were entered into with relation to the laws of New York, These gentlemen, so far as the evidence shows, were Mr. Nichols, Mr. Sturges, and Mr. Butterfield. I believe that no intimation was given by any of them that articles of association had already been subscribed, consti-

tuting the Butterfield Overland Dispatch Company. On the contrary, the propositions made were entirely inconsistent with this leading fact. If we believe the declaration of the defendants (and they have not been affected by any statements, so far as I know, introduced on the part of the plaintiff), the motives held out to them to induce them to become parties to such an association, were entirely different from those the actual state of facts would warrant.

Here was a company already organized, the parties to which were personally responsible for the debts of the concern, which may have been very large at the time. Of course, the action of the defendants under such a state of facts, if they had been communicated to them, might have been entirely different from what it was.

The first question, therefore, is, whether defendants became parties to this association, as partners, with a knowledge of the circumstances of its existence at the time, and with good faith exercised to them by those who induced them to become parties. If they did, of course they are bound by the position of affairs at the time. But this is not claimed, as I understand, by the plaintiff, for if the testimony which has been given by the defendants can be relied upon, the contract entered into and the money that was paid by these defendants was upon an entirely different supposition from that justified by the actual state of affairs. And, therefore, I think, if this testimony can be relied upon (of course you are to judge of the testimony), there can be no original liability on the part of these defendants on the ground of their knowledge of the condition of the Butterfield Overland Dispatch Company at the time that they became parties; and it is certainly a significant fact that Mr. William Sturges, who was the main instrument and agent by which these defendants were induced to subscribe and pay their money, has not been called by the plaintiff to affect in any degree the testimony of the defendants.

If, however, they were not parties in consequence of not understanding the position of affairs, misrepresentations being made to them of facts, it does not follow that they may not

have become parties by subsequent acts of their own, with knowledge of the facts. And the next question is, have they so become parties? In order to determine this, you are to take the facts that are applicable to all the defendants, not those applicable to one or more of the defendants less than the whole; because if you find the defendants liable at all, you have to find them all liable, and you have only to apply the facts which have been proved as to all. If there have been facts proved as to some, not as to others, you have only to take those which apply to all, and determine whether they convince you whether the defendants have become parties to the articles of association.

The defendants were applied to, I think most of them, and subscribed and advanced their money in the summer of 1865. As I have already said, if we believe their testimony, they did not know at that time that the company had been organized under the laws of New York, and that there were large liabilities against the company which they might be called upon to assume. Have they done so since by any acts of their own? Have they become liable as partners?

In August, or in the early part of the fall of 1865, certificates of stock were made out and forwarded by the officers of the Butterfield Overland Dispatch Company to the subscribers and stockholders here, and they were received, as I understand, by the defendants. These certificates of stock (most of them) have been introduced, and it is admitted that they are all similar in character. Now, the certificate of stock which each of the defendants received, bore on its face that the holder was entitled to a certain number of shares of stock in the Butterfield Overland Dispatch Company, and also that the holder was subject in the future to the payment of such assessments as might be made in case of loss or other necessity, and to all the obligations and liabilities of the company, and also entitled to all the privileges of a member as fully as if he had signed the articles of association.

We have spoken of the faults of the gentlemen of New York; we must now refer to what must be considered a fault of the defendants.

Many of the defendants say that they received the certificates of stock without examining them. They certainly knew what they were. They purported to represent their interests in a company or organization, for which they had subscribed or paid their money. It is presumable, I think, that if the company had earned profits they would have claimed the profits under this evidence of their interest in the company.

It certainly was, therefore, their duty to examine the document which they had received, indicating the interest they had in the company and the money they had paid. It may be true that men do not always examine certificates of stock, and yet there never has been known, I believe, an instance of a man who became a member, in this way, of a company, who, if the company realized profits, did not claim them by virtue of such certificate. Then, that being so, there would be a natural inference that, claiming the advantages and profits, he must bear the burdens and losses. But the only effect of this, in this case, is as to the conclusion to be drawn against the defendants by the circumstance that the certificates contained certain language that they were shareholders in the Butterfield Overland Dispatch Company, and that they were subject to the payment of assessments for losses or from other necessity, and entitled to all the privileges of the association as if they had actually signed the articles.

Now, if these had been given to the defendants, without any previous representation having been made, the effect of this might have been stronger than it was under the conceded state of facts.

Because it is quite possible that those who did look at the certificates of stock might have regarded them under the influence of the representations which had been made by the agents who applied to them for subscriptions and for their money, and therefore they might not draw the same inference or conclusions from them that they would, had they been uninfluenced by such representations; and all that I can say to you, if you believe this testimony, is simply this: that if he examined these certificates of stock, it would seem to have

been the duty of every stockholder to make some inquiry as to his relation with this Butterfield Overland Dispatch Company; to know, in other words, where he stood, what his responsibilities were as a member of the company, and if, in point of fact, he found himself in a different position from what he supposed he was from the representations that were made, to repudiate that connection, to disavow it at once, and have nothing more to do with it. That nothing of this kind was done was, I think, a fault on the part of some of the defendants, and, I must say, one not very creditable to their character as business men. But I cannot say that you can disregard, in connection with this aspect of the case, the bearing and effect of the representations that were made as inducements to them to become parties to the company. Because it is indispensable, I think, in order to make out a liability against these defendants, that they should be possessed of full knowledge of the circumstances of their connection with the company which was then organized; and if they accepted this stock with this full knowledge of the circumstances, then they were bound, as prudent and discreet business men, to follow up the intimation given in this certificate of stock, and to ascertain the position in which they stood, and are to be visited with all the consequences of partners in this association, but not otherwise.

Again, if they did become members of this association with the full knowledge of the circumstances connected with the position of the Butterfield Overland Dispatch Company, what is the measure, under the facts of the case, of their liability to this plaintiff? That is another and distinct question.

It is conceded that no one of these defendants was a member of the association at the time the contract was made between the company—the Dispatch Company—and the plaintiff for a loan of the money, on the 21st of April, 1865, by which it was agreed that the plaintiff should advance to the company $100,000, in sums as they might be wanted; and, in fact, on that day $10,000 were advanced, and on the 1st of May $55,000, and the 2d of May $20,000, and on the 3d of June

$5,000—$90,000, advanced before, as I understand, any of these defendants became connected with this company.

Now, to say nothing of the $20,000 advanced in November, are these defendants responsible for the money which was advanced before they became connected with the company? Of course the only ground upon which they are liable is, that they associated themselves with the company, either by express declaration or by acts which admit of no reasonable doubt that they assumed, as members of the company, all the liabilities of the company at that time. It is only in that way, by relation back of the position of the company at the time they connected themselves with it, if they ever did, that they could become liable for the $90,000 advanced to the company before that connection. Of course, if with full knowledge of the facts they did become parties, either expressly or by implication, to this joint stock company, from the beginning, they are as responsible for the debts of the company as those who were original parties to articles of association, but not otherwise. They must have become parties with full knowledge of the facts, understanding their position and relations to the company.

As to the $20,000 advanced on the 15th of November, that would depend, of course, first, upon the fact whether they were partners, and secondly, whether, as such partners, they reaped the benefit of the advance that was made, and enjoyed its fruit. If they did, then I think they are estopped from asserting they are not liable. If they, at the time the $20,000 were advanced, were partners of the association, and had as such the full benefit of the advance, they would be liable equally with their associates for the advance. You will see, therefore, there are three questions which the court submits to you.

In the first place, whether these defendants became subscribers, and advanced their money to the company with full knowledge of the circumstances of its existence at the time, and with the exercise of good faith, and true statements and representations made to them by the agents of the

company when they subscribed their names and advanced their money. If you shall believe they did not become partners by that act, by anything that was done, then the next question the court submits to you is whether with full knowledge of the facts they have become partners since. It may be true that bad faith was used towards them at the time their subscriptions and money were obtained. It may be true that fraud was practiced; but it was competent for them, with knowledge of all the facts, to waive the fraud, and if they did —if they assumed the advantages of members and partners of the association—they cannot, when they are called upon to respond for the contracts of the association, be heard to deny their liability.

Thirdly, if they were partners and members of the association, what is the measure of their liability, and whether for the whole or only a part of the advance made by the plaintiff?

It is to be observed that this is not an action by the Overland Dispatch Company against these defendants for assessments made against them, as shareholders, by the company. It is not a bill in equity calling upon the defendants to respond to the creditors of the company for advances which have been made; but it is an action at law against these defendants, as members of the association—partners—liable as partners for the debts of the company, and their liability must be measured by the rules which are applicable to a partnership concern, under which one member of a firm is liable for the debts of the firm; and in this aspect of the case, of course, the whole question turns upon the fact whether they were partners and members of the company.

For a further discussion of the liabilities of stockholders, consult *Upton, assignee, etc., vs. Hansbrough*, and *Same vs. Burnham*, January, 1873, to appear in subsequent volume of these Reports, and cases there cited. [*Reporter.*

In re SHEA AND BOYLE.

DISTRICT COURT.—DISTRICT OF INDIANA.—JUNE TERM, 1869.

IN BANKRUPTCY.

1. The failure of a banker, merchant, or trader, who has suspended payment of his commercial paper, to resume within fourteen days, is *prima facie* evidence of fraud.
2. Unless such inference is affirmatively rebutted, he will, on a proper creditor's petition, be adjudged a bankrupt.

The petition herein was filed by J. H. Heinsheimer and others against Patrick Shea and William Boyle, June 7th, 1869, charging that they, being partners, traders, etc., committed an act of bankruptcy, in this, "that within six months next preceding the date of this petition, the said Patrick Shea and William Boyle did commit an act of bankruptcy within the meaning of said act, in that they did, on the 28th of January, 1869, fraudulently suspend and stop the payment of their commercial paper, and did not resume the payment thereof within fourteen days thereafter, and have never paid the same." This "commercial paper," the petition alleges to be a note, dated at Cincinnati, January 27, 1869, for $926.55, payable one day after date, to the order of the petitioners, and executed to them by Shea and Boyle. The defendants filed an answer denying the allegations in the petition.

Reid & Carey, for petitioners.

Hendricks, Hord & Hendricks, for respondents.

MCDONALD, J.—The language of the bankrupt act is, that every person, "who, being a banker, merchant or trader, has fraudulently stopped or suspended, and not resumed payment of his commercial paper within a period of fourteen days, shall

be deemed to have committed an act of bankruptcy." This question has been much discussed in many of the district courts of the United States; learned judges have given various and different answers to it; and it still remains unsettled. Three views appear to have been taken of it: first, that the mere failure to pay, or to resume payment, is conclusive evidence of fraud; second, that it is only *prima facie* evidence of fraud; third, that it is no evidence at all of fraud. Without entering upon a discussion of the reasons upon which different judges have come to these opposite conclusions, I conclude that the failure to pay and to resume payment is *prima facie* evidence of fraud, and no more. I thus decide, for the following reasons:

1st. To hold that such failure to pay and to resume payment is conclusive evidence of fraud, and consequently of an act of bankruptcy, would sometimes be followed by unjust and absurd consequences. If we adopt this rule, then we might force into bankruptcy the wealthiest and most prosperous trader in the country. Suppose a trader to be worth $100,000, and to owe $1,000 on commercial paper. At the time when this paper falls due, some accident befalls him—he is prostrated by sickness—all the money he has on hand is stolen or depreciates greatly in value—or suppose that he is necessarily abroad, and cannot reach home within the fourteen days, and by mere forgetfulness, did not, before leaving home, provide for paying such commercial paper—in these and many other cases that might be supposed, the creditors would be entitled to file their petition against him in bankruptcy on the next day after the expiration of the fourteen days. But in such cases it would be harsh and absurd to hold that his mere failure to pay before the petition was filed, is conclusive of a fraudulent intent on his part, and to preclude him from offering evidence exculpating him from such intent, and evincing his ability and willingness to pay.

2d. It is a point of pride, as well as of duty, that traders shall not suffer their commercial paper to be dishonored. Every one knows that such dishonor seriously affects his com-

mercial reputation and business. It is reasonable, therefore, to presume, when he fails promptly to honor his commercial paper, either that he does so fraudulently, or is insolvent. For if he can pay, and does not, that is, among traders, a fraud within the meaning of the bankrupt law; and if he is insolvent and cannot pay, but still carries on his trade, this, I think, is, in view of that law, a fraud—at least, he can, in that case, have no reason to complain if his creditors attempt to have him adjudged a bankrupt. I think, therefore, that a banker, merchant or trader who stops the payment of his commercial paper for fourteen days, and does not afterwards resume it before he is proceeded against as a bankrupt, is not to be deemed *prima facie* innocent of all fraud.

3d. Such a failure to pay on the part of a banker, merchant or trader ought to be so far deemed evidence of fraud as to cast on him the necessity of explaining his conduct, because of the great difficulty in such a case of proving actual fraud. It is generally true, indeed, that, when the question is fraud or no fraud, he who alleges fraud must prove it. But in cases like the present it is almost impossible by direct evidence to prove actual fraud. However great the fraud might be, all that we could reasonably expect the petitioner to be able to prove, would be the failure of the debtor to pay the commercial paper. The intent which led to the failure, it would generally be impossible to prove by anything like direct evidence. But on proof of the failure, I think, the fraudulent intent may be fairly inferred till the contrary is proved. On the other hand, if facts exist which may fairly rebut the inference of fraud, they would in most cases be easily proved. For example, the facts we may suppose to be, as above stated, severe and protracted sickness or unavoidable and unexpected absence from home, and the like. In such cases, the debtor could generally prove the facts, and thus rebut the *prima facie* case made by proof of the mere omission to pay. This rule making the mere failure to pay *prima facie* evidence only of a fraud, therefore, commends itself to us on account of its fairness, its plainness, and its easy and general application to cases of this

kind. Moreover, it appears to me to be quite consistent with the general scope of the bankrupt act, and to do no violence to the 39th section, on which this question arises. Avoiding extremes, therefore, and following the maxim *in medio tutissimus ibis*, I conclude that the failure on the part of a banker, merchant or trader to pay his commercial paper for fourteen days after it falls due, unless payment is resumed before proceedings in bankruptcy are commenced against him, is *prima facie* evidence, and only *prima facie* evidence, that he has committed an act of bankruptcy.

To the same effect are the following: *In re Jersey City Window Glass Co.*, 1 Bankrupt Register, 113; *In re Ballard and Parsons*, 2 do., 84; *In re Lowenstein, et al*, Id. 99; *Doan vs. Compton & Doan*, Id. 182; *Davis & Green vs. Armstrong*, 3 do., 7; *In re Hollis, et al*, Id. 82. That fraud must be proved: *In re Leeds*, 1 Bankrupt Register, 138; *Gillies vs. Cone*, 2 do., 10; *In re Davis*, 3 do., 89.

Since the amendment making the clause read "fraudulently stopped payment, or who has stopped or suspended and not resumed payment of his commercial paper within a period of fourteen days," it is held that the "fourteen days" applies to the suspension only, and that the word "fraudulently" only relates to the first portion of the clause. *Claflin & Co., vs. Wells*, 6 Internal Revenue Record, 181; *In re Cowles*, 1 Bankrupt Register, 42; *In re Schoo*, 3 do., 52; *In re Thompson*, Id. 45; *In re Hall*, 1 Dillon, 586; *In re Burt*, Id. 439; *Baldwin vs. Wilder*, 6 Bankrupt Register, 85. [*Reporter.*

In re CROMIE.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—JULY TERM, 1869.

REMOVAL FROM STATE COURT.

1. The U. S. Circuit Court has no power to issue a writ of *mandamus* to compel the removal of a cause from a state court.
2. The act of July 27th, 1866,[1] made no change in this respect.
3. The statute seems to contemplate some judicial action on the part of the state court.

This was a motion by Charles and Amelia Cromie, defendants in a suit pending in the Circuit Court of Lee county, for a writ of *mandamus* against the state court to compel a removal of the cause into this court.

John J. McKinnon, for plaintiffs.

Ustis & Barge, for defendants.

DRUMMOND, J.—The decision of the motion for a *mandamus*, on the application of Charles and Amelia Cromie, was postponed for the purpose of enabling me to look into the law of July 27, 1866, to see how far the Judiciary Act of 1789 has been modified. I have since examined the law of 1866, and am satisfied that, so far as this motion is concerned, no change has been made by that act in the law of 1789.

I had occasion, as was intimated the other day, in the case of Hough and others against the Western Transportation Company,[2] decided in January, 1864, to examine the question as to the authority of this court, under the act of 1789, to issue a *mandamus* to a state court, compelling the latter to remove a cause to this court, and came to the conclusion that the

[1] 14 U. S. Statutes at Large, 306.

[2] Volume 1 of this Series, page 425.

authority did not exist, and for that reason declined the writ then; and I shall now, for the reasons contained in the opinion then given, decline to issue a writ in this case.

The material change made in the Judiciary Act by the act of July 27, 1866, consists in the power of removal from the state to the federal court given by the last act to some of the parties, provided the case can proceed in the federal court without the presence of all the parties to the suit, and whereas, by the old law the application was to be made at the time of entering appearance, the law of 1866 authorizes the removal at any time before the trial or final hearing of the cause. The language of the act of 1866 is substantially the same as that of 1789, namely: "And it shall be thereupon the duty of the state court to accept the surety, and proceed no further in the cause as against the defendant so applying for its removal." I do not find in this law, as is the case in some of the recent statutes concerning removals from state courts of cases affecting the revenue, a provision authorizing the federal court to proceed, irrespective of the action of the state court, with the cause. But the act of 1866, like the act of 1789, seems to imply, in order that the removal shall be complete, some judicial action of the state court. And when the cause is removed in the manner prescribed, it provides that "the cause shall there proceed in the same manner as if it had been brought there by original process against the defendant who shall have filed a petition for its removal as above provided," the language being substantially the same as that contained in the 12th section of the act of 1789: "and, the said copies being entered as aforesaid in such court of the United States, the cause shall there proceed in the same manner as if it had been brought there by original process."

I am not aware that the question has ever been decided as to what would be the effect of a compliance with the provisions of law for the removal of the cause from a state court, and of its refusal to make the necessary orders, if the parties asking the removal should file copies of the papers in the federal court, with a view of giving the latter jurisdiction of the

cause.[1] The cases that have been decided under the law of 1789, where there has been a refusal on the part of the state court to remove the cause, have generally been decided by the Supreme Court of the United States so that the case has proceeded alone in the state court, and not at the same time in the state and in the federal courts. There would seem to be something incongruous in two suits, between the same parties, and referring to the same subject matter, proceeding at the same time in a state and in a federal court, although the statute of July 27, 1866, seems to contemplate that, as to the parties to the suit who have not made the application for removal, there may be instances where the cause may proceed in the state court, and, as to those seeking the removal, in the federal court. Whatever may be the true rule upon the subject, these parties do not at present seem to be in a proper position to avail themselves of the right they ask, because, as I understand, they have not filed in this court copies of all the proceedings in the state court.

Therefore, at present, the motion for the court to take jurisdiction of the cause, the court overruling the motion for *mandamus*, will, for the reasons just given, have also to be overruled.

Consult, however, *Spraggins, vs. County Court of Hampshire*, Cooke, 160; *Ladd vs. Tudor*, 3 Woodbury & Minot, 325; *In re Turner*, 3 Wallace, Jr. [*Reporter*.

[1] For a discussion of this question, consult *Akerly vs. Vilas*, *ante p* 110.

In re McGIE.

DISTRICT COURT.—EASTERN DISTRICT OF WISCONSIN.—JULY TERM, 1869.

IN BANKRUPTCY.

1. A judgment by default, and execution upon a note given when the creditor had cause to believe the debtor insolvent, are preferences under the act, and do not give a valid lien upon the property of the debtor, or its proceeds.

2. The debtor *suffers* his property to be taken under legal process, by not defending; he should file his petition in bankruptcy.

3. The court will not order such a judgment to be satisfied from funds in the hands of the assignee.

This was a motion by Wm. H. Sanger, execution creditor of the bankrupt, to have his judgment satisfied from the proceeds of sales of property of the bankrupt, taken in execution, and turned over to the assignee in bankruptcy.

The facts further appear in the opinion of the court.

Hopkins & Sanborn, for the motion.

H. W. & D. K. Tenney, contra.

MILLER, J.—In April, 1868, Geo. B. McGie, being largely indebted to Wm. H. Sanger, a merchant of New York, upon notes due and payable, gave a new note payable one day after date, with warrant to confess judgment. Before making the note it was a subject of discussion whether the security should not be a chattel mortgage on McGie's stock of goods, which was advised against by the attorney. Sanger was a business friend of McGie, and would not allow his note to be protested for non-payment. At the date of the note, McGie complained of dull times and inability to pay other debts, of which Sanger had notice. A summons was issued to recover the amount of the

note given in April, and a judgment was rendered in the United States Circuit Court, in November last. By virtue of a *fieri facias* issued on the judgment, the marshal levied on McGie's stock of goods. William H. Fitch and other creditors then proceeded against McGie in bankruptcy, and in January last he was adjudged a bankrupt. The marshal, under an order of the court in bankruptcy, delivered over the stock of goods to an assignee. Sanger now applies to the court to be paid the avails of the sale of the goods made by the assignee, claiming a preference by reason of the execution and levy. Prior to the suit, Sanger instructed that the goods should be taken possession of, under the impression, no doubt, that execution might be or had been issued in satisfaction of his judgment note, which was payable one day after date.

It is contended that the judgment was obtained in due course of legal proceedings, and that McGie did not "procure or suffer his property to be taken on legal process." An insolvent debtor commits an act of bankruptcy when he "gives any warrant to confess judgment, or procures or suffers his property to be taken on legal process." The warrant to confess judgment was an act of bankruptcy committed by McGie to prefer his friend and accommodating creditor, who knew at the time of McGie's inability to pay his notes to other creditors. And the result shows conclusively that McGie was at that time insolvent to a large amount.

There was no necessity for the suit on the note. Judgment could have been entered without a summons. The warrant to confess judgment cut off defense to the action, and McGie suffered judgment to be taken by default. By the warrant to confess judgment McGie consented that his property should be levied on under an execution, and by his default he suffered it to be done. If McGie did not directly *procure* his property to be taken on legal process, he *suffered* it to be done. There is a distinction between *procuring* and *suffering* property to be taken on legal process. Either is an act of bankruptcy. The bankrupt act prohibits preferences to be obtained by a creditor when his debtor is insolvent, or in

contemplation of his insolvency or bankruptcy, by the taking of the debtor's property on legal process, whether the taking be by an act of procurement or by an act of sufferance on the part of the debtor, where there is an intent on the part of the debtor to give such preference, and the creditor has reasonable cause to believe that the debtor is insolvent. McGie should have prevented the preference to Sanger by means of the levy, by an application for the benefit of the bankrupt act. Knowing himself to be insolvent, he should have pursued the course of equity to all his creditors required by the act. Sanger and McGie both knew that the probable consequence of the judgment note, if pursued, was to give a preference. The object and intent of the bankrupt act is to require a debtor in failing circumstances to subject his property to an equal distribution among his creditors, in proportion to their respective debts. The proceeding in the case falls within the prohibition of this act. There is no essential difference in this case from a seizure and sale by virtue of a chattel mortgage or on execution issued on a judgment by confession. McGie permitted what he should have prevented, and he thereby *suffered* his goods to be taken on legal process in favor of a friendly creditor who had at least cause to believe that his debtor was insolvent.

The application is denied.

The preference upon a judgment note is not obtained when the warrant of attorney is given, but when the judgment upon it is entered. *Golson vs. Neihoff*, *post p.* 484.

The sufficiency of the judgment depends upon the knowledge or information the creditor had at the time he made his warrant operative. *Ib.*

A creditor who knows that his debtor cannot pay all his debts in the ordinary course of business, has reasonable cause to believe him insolvent, and will not be allowed to secure, by confession of judgment and levy of execution, any preference over other creditors. *Wilson vs. Brinkman*, 2 Bankrupt Register, 149.

Judgments obtained against a debtor at the time insolvent, by creditors who had not reasonable cause to believe him so, are good against the assets. *In re Wright*, 2 Bankrupt Register, 155.

Where bankrupt while solvent gives warrant of attorney to confess judgment, and creditor takes judgment thereupon with notice of subsequent bankruptcy such judgment is good against the assets. *Id.* [*Reporter.*

In re THOMPSON & McCLALLEN.

DISTRICT COURT.—NORTHERN DISTRICT OF ILLINOIS.—JULY TERM, 1869.

IN BANKRUPTCY.

1. In the 39th section of the Bankrupt Law, "has fraudulently stopped or suspended and not resumed payment of his commercial paper within a period of fourteen days," the word "fraudulently" should be construed as limiting "stopped" only, and the words "fourteen days" as applying only to the *suspension*, &c.

2. When the stoppage is fraudulent it is not necessary that it be continued, and a suspension of payment for fourteen days, though without any element of fraud, constitutes an act of bankruptcy.

3. A refusal on the ground of a legal defense, is not a stoppage or suspension within the meaning of the law.

This was an involuntary petition alleging that Thompson and McClallen committed an act of bankruptcy within six calendar months next preceding the date of filing the petition, in that they, being merchants, on the 2d day of January, 1869, suspended, and have not resumed payment of their commercial paper within the period of fourteen days, setting forth what the commercial paper was. Respondents filed a general demurrer.

Bentley & Hart, for creditors.

C. C. Bonney, for respondent.

DRUMMOND, J.—An objection is taken on the part of Thompson and McClallen that this is not an act of bankruptcy within the meaning of the law.

The clause of the 39th section of the bankrupt law under which the question arises is this: "or who, being a banker, merchant or trader, has fraudulently stopped or suspended, and

not resumed payment of his commercial paper within the period of fourteen days."

That constitutes an act of bankruptcy on the part of any person who is within the conditions named, and the only question, as I conceive, is whether the word "fraudulently" applies to and qualifies the whole of the clause—whether it is to be read as if written: "who, being a banker, merchant or trader, has fraudulently stopped or fraudulently suspended, and not resumed payment of his commercial paper within the period of fourteen days," or whether it is to be read as if written in this way: "or who, being a banker, merchant or trader, has fraudulently stopped" payment of his commercial paper; or who, being a banker, merchant or trader, has "suspended and not resumed payment of his commercial paper within a period of fourteen days," applying the words "fourteen days" to the *suspension* only, and without the use of the word fraudulently; and I think the latter is the true construction. It would seem to be unreasonable to say that in order to constitute an act of bankruptcy, a merchant, banker or trader must stop during fourteen days by a *continuous act of fraud.* It would seem as though *one* act of fraud, by stopping payment of his commercial paper, committed by a banker, merchant or trader, should constitute an act of bankruptcy. There is no reason why there should be a continued fraud for the period of fourteen days, in order to constitute an act of bankruptcy; because where a merchant, banker or trader—and who is therefore within the terms of the law—deliberately commits an act of fraud, by refusing to pay or by stopping payment of his commercial paper, he is in that condition where his creditors ought to have the right to call upon him to surrender his property for their benefit. He has acted dishonestly, and he should have his property administered in a bankrupt court.

And on the other hand, where he merely suspends the payment of his commercial paper, it was highly proper that some time should be fixed, within which, if he does not resume, it should be treated as an act of bankruptcy; because it was foreseen that he might suspend payment of his commercial paper,

through accident, a particular emergency or exigency, which might be temporary in its character, as in consequence of the non-receipt of remittances, or of the non-arrival of a vessel, or from other similar causes, and therefore the law intended that if there was a suspension in consequence of any of these causes, it should not be treated as an act of bankruptcy unless it continued for a certain time; and inasmuch as it was the province of the law-maker to declare what that time should be, he, in his discretion has fixed the time at fourteen days.

But if a man declines to pay solely because he is not liable to pay, or because he has a valid claim against the paper, or a set-off, that is not a stoppage or suspension, as I understand it, within the meaning of the bankrupt law.

But where the paper is due and it is not paid because, without adequate legal excuse, he will not pay, or because he is unable to pay, and it is continued for the period of fourteen days, that constitutes an act of bankruptcy.

I am aware that different constructions have been given to this clause by different courts, but it seems to me that this is the only construction which is consistent with the general scope and spirit of the bankrupt law. The law ought to make no compromises with a fraudulent act, but if the construction contended for on the part of the defense is the true construction, then it does make terms with an act of fraud, and declares the fraud may be continued day after day, but, if less than fourteen, no act of bankruptcy has been committed.

I do not think that could have been the intention of the law-maker in the use of this language. It may be conceded that it is not so clear and distinct as it might have been; but we have to construe it with a view of carrying into effect the spirit of the law, and the construction which I have placed upon it I think best accomplishes that result.

Demurrer overruled.

Consult *In re Shea and Boyle ante*, p. 156, and authorities there cited.

That refusal to pay on the ground of a valid defense, claim or set-off is not an act of bankruptcy: *In re Chandler*, 4 Bankrupt Register, 66; *Bank vs. Iron Co.*, 5 do., 491; *In re Hercules Mutual Life Assurance, Co.*, 6 do., 338; *In re Munn*, January, 1873, to appear in subsequent Volume of this Series.—[*Reporter.*

FLOOD vs. HICKS.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—JULY TERM, 1869.

PRIORITY OF INVENTION—SIMILARITY.

1. A patent for an improvement in a wagon reach, consisting of an upward curve, whereby, in turning, the forward wheels are allowed to pass under the reach, combined with an extension of the ordinary sway-bar, so arranged upon the hounds that it will still form a support for the reach, can not be sustained when it is proved that a carriage fitted with a reach which had a bend allowing the wheels to pass partly under, and with a circular sway-bar or wheel by which the reach would be sustained in all positions, had been in use for several years.

2. Increasing the curve in the reach, or diminishing the diameter of the wheel, would allow it to pass completely underneath, as in the plaintiff's patent; and this is a change which would naturally suggest itself to any mechanic, and cannot be the subject of a valid patent when the substantial invention had been previously in use.

3. The circular sway-bar would have performed the same office as the plaintiff's improved extended sway-bar, had the wheel passed beneath the reach, and the plaintiff's patent for the curved reach having failed, his claim for the improved sway-bar must fail with it.

4. The name by which any structure or part is designated is immaterial.

This action was a suit at law for infringement. The parties waived a jury, and the cause was by consent tried by the court.

The facts appear in the opinion.

L. L. Bond, for plaintiff.

S. A. Goodwin, for defendant.

DRUMMOND, J.—The plaintiff claims, by virtue of a patent, dated the 15th of October, 1867, an improvement in a wagon reach, and the allegation is that the defendant, who also has a patent, dated the 27th of October, 1868, violates the patent of the plaintiff.

thus having existed for so long a time, there was this circular sway bar, sometimes called the fifth wheel, and it was clear that if the wheel was lessened so as to pass bencath the reach, or the curve increased, that the reach would rest upon the sway bar as the carriage was turned and as the wheels passed beneath the reach. It is because the idea is apparent in the carriage that was manufactured some fifteen years ago, of the effect of the curve in the reach, that the first claim of the plaintiff's patent cannot be sustained. In that the reach passed from the axle of the hind wheels in a straight line toward the axle of the forward wheels until it came to a curve, and then there was a sweep upward and it came down to a straight line and was so continued on to the axle of the forward wheels.

The idea in the first claim of the plaintiff was in that carriage, and to make the forward wheels go beneath was simply a change which any mechanic could make and which would naturally suggest itself, if that was the *desideratum*, to any mechanic looking at the construction of the carriage.

Then, as to the second claim. The plaintiff constructs his wagon with what he calls a fifth wheel, that is, a circular piece of wood, iron, or of any other material, (of course it may be so constructed) passing over hounds and on the forward axle, and outside of and concentric with that, what he terms a sixth wheel, which constitutes a sway bar, also passing over the hounds and on the forward axle, and upon which the reach rest as the wagon turns, in the manner suggested by this model, which is a perfect resemblance of the plaintiff's wagon.

The question is, what is the difference between the structure of this and the one which was referred to in the testimony, and which, it was established, has been in existence for fifteen or sixteen years? Of course, what this circular piece of wood, of iron, or of other material is called is immaterial; calling it a sway bar does not change the nature or form of the thing itself, and in that carriage which was constructed long before the plaintiff's there was the equivalent to all intents and purposes, as it seems to me, of what the plaintiff calls the sway bar; that is to say, there was a circular piece of wood or iron. There was in this,

which is a representation of the carriage, what the draughtsman has called a sway bar; it, perhaps, may not have been called so by the man who constructed the carriage, but it is clear that it would perform the functions of a sway bar precisely as in the plaintiff's wagon, if the wheels passed beneath the reach, so that the question arose in my mind, and it was the only one about which I had any doubt in the case, whether this could properly be the subject of a patent; whether the invention was of such a character that it could be considered patentable; and on the whole, when comparing it with the carriage already referred to, I could not perceive that there was any material difference in the structure of the two things. In this wagon of the plaintiff, it passes around, the wheels go beneath the reach, and of course, the reach rests upon the sway bar. The same office would be performed by this circular piece of wood or of iron, as the case may be, in the carriage, if the wheels went beneath the reach, and then the only point that could possibly arise was, whether changing the form of the structure of the reach or of the forward wheels of the wagon so as to permit them to go under the reach was a matter of invention and patentable as such, and for the reasons that I have already given it seems to me that it was not, and therefore that the second claim must fail as well as the first.

In looking at this case I am struck with the facility with which patents are obtained, because it would be incomprehensible to me if the officers in the patent office had known of the existence of such a carriage as that which was proved, with the reach as there constructed, they could have granted a patent in such a case as this, and while it is perfectly just that every real, genuine invention devised by any one should be protected; still it is not just to the public that mere changes of form should have the protection of the law. Perhaps there is reason to believe they are not sufficiently rigid on this point in the patent office. It is true that, the officers there being the persons to whom the law intrusts the examination of inventions and the granting of patents, the courts are liberal in the construction which they give to patents, with a view of protecting

any possible right which a party may have. But to allow a person by a mere change in the structure of a machine, such as would suggest itself to any mechanic, to acquire a monopoly for that change, and the shield and protection of the law would be an abuse of the law itself.

The finding in this case will be for the defendant.

UNITED STATES vs. ILLINOIS CENTRAL RAILROAD COMPANY.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—AUGUST, 1869.

DEDICATION BY GOVERNMENT.

1. The making and recording by a proper government agent of a plat of land belonging to the United States, a portion of which was designated as "public ground forever to remain vacant of buildings," with a memorandum added to the plat declaring that this portion, "is not to be occupied with buildings of any description," is a dedication of such portion to public use of the kind and character mentioned in the plat.

2. COMMON LAW DEDICATION.—All the provisions of the state law not having been complied with, it was not a statutory but a common law dedication; the fee did not vest in the city under it.

3. GENERAL AND SPECIAL DEDICATION.—A distinction can be taken between a general and a special dedication, and in this case the fee remained in the United States, which still retain control over it so far as is consistent with the purposes for which it was specially dedicated, and no further.

4. CANNOT BE DIVERTED.—Property having been specially dedicated to a particular purpose, neither the state nor the municipality has the right to divert it from that purpose, except under the right of eminent domain.

5. EMINENT DOMAIN.—This right cannot be granted; it can be exercised only by the courts and by the Legislature.

6. MANNER OF CONDEMNATION.—The legislature cannot take land from the owner and give it to a corporation, even for a public purpose; it must proceed in conformity to the law, and the compensation must be judicially ascertained, and cannot be fixed by statute.

7. The United States has such an interest in the land that it can appeal to a court of equity.

United States vs. Illinois Central Railroad Company.

This was a motion for a preliminary injunction on a bill filed in behalf of the United States to restrain the Illinois Central and other railroad companies from taking possession, for depot and other purposes, of the south portion of fractional section 10, Township 39, north range 14, and commonly known as a part of the Lake Front in Chicago.

The facts are fully stated in the opinion of the Court.

J. O. Glover, U. S. District Attorney, for the United States.

George Trumbull and *J. N. Jewett*, for defendants.

DRUMMOND, J.—The questions involved in this case are of the very highest importance, affecting interests of great magnitude, and they should be more fully considered and opportunity given for further argument and investigation. I do not propose, now, to do more than state the conclusions at which I have arrived, with perhaps, some incidental argument indicating why I have reached those conclusions.

The facts stated in the bill are not controverted, and are substantially these: After the litigation concerning the south fraction of section 10 in township 39, range 14, east of the third principal meridian, upon which Fort Dearborn was situated, had been settled by the decision of the Supreme Court of the United States, reported in the case of *Wilcox v. Jackson*, 13 Peters, 498, in favor of the right of the United States to the land, the Secretary of War, under the act of Congress of 1819, proceeded to dispose, by sale, of a portion of the land, the right and title to which had been determined to be in the United States by this decision. With the view of facilitating the sale, Mr. Burchard, in 1839, as the agent of the Government, made a plat of the land, dividing it into lots, blocks, and streets, etc., by analogy and in conformity with the practice existing under the law of the state concerning town plats. This plat was recorded in the recorder's office. Upon the plat, thus made and recorded, there was a strip of land, south of Randolph street and north of Madison street, and between certain lots

and blocks and Lake Michigan, designated as "public ground forever to remain vacant of buildings," and by a memorandum added to the plat, it was declared that "the public ground between Randolph and Madison streets, and fronting upon Lake Michigan, is not to be occupied with buildings of any description." Sales were made at the time of many of the lots, in conformity with the plat, and title given under the authority of the Secretary of War.

In 1850, Congress granted to the State of Illinois certain lands for the construction of a railroad from Cairo, with branches to Chicago and Galena; and by an act of the Legislature of 1851, of this state, the Chicago branch of the Illinois Central Railroad, was terminated at Twelfth street, in the city of Chicago. By a subsequent act, in 1852, authority was given to the Illinois Central Railroad Company to proceed from Twelfth street to the south branch of the Chicago river, and by a contract made with the city and an ordinance affecting the same, between the city and the railroad company, a track was constructed about 400 feet east of Michigan avenue, and from Twelfth street to the south branch of the Chicago river.

The bill alleges that this was done without authority on the part of the United States, and that the latter was not a party in any way to the arrangement.

It will be seen from what has been stated, after the land had been thus set apart, in the way described, that the city of Chicago assumed a certain control and authority over it, making the contract and passing the ordinance upon that assumption. The track thus made by the Illinois Central Railroad Company was used from the time of its construction up to the passage of the recent act of the Legislature of April 16, 1869, which has given rise to this controversy.

By that act there was granted to some of the defendants a tract of land described as the south fraction of section 10, for the erection thereon of a passenger depot, and for "such other purposes as the business of said companies may require." In consideration of this grant, thus made by the act of the Legislature, the railroad companies, the Illinois Central,

Chicago, Burlington and Quincy, and Michigan Central, were required to pay to the city of Chicago $800,000 in the manner therein described; and the Common Council of the city of Chicago were authorized and empowered to quit-claim and release to the Illinois Central Railroad Company and others, any and all claim and interest affecting the said land.

The bill alleges that under this act of the Legislature, these companies threaten to proceed and erect buildings upon the land thus described and set apart for the special public purpose mentioned.

Although the bill has a wider scope as affecting the rights of navigation, yet the only question now submitted is whether, as the case is presented, they have a right, under this act of the Legislature, thus to proceed.

First, as to the position of the United States touching this land, the south fraction of section 10.

There can be no doubt, I think, under the facts as stated, that with the consent of the Government, through its authorized agent, the land was dedicated to public use of the kind and character mentioned. It may be asked whether this dedication was what is called a statutory dedication, or whether it was a dedication at common law. I think it was a dedication at common law and not under the statute. It is true that there was an attempt, to conform to the conditions required by the law in relation to town plats. It was made out, and recorded, but all the various provisions required by law do not seem to have been complied with. And I understand the rule to be, that, if they are not, it is not a statutory dedication, the effect of which is to vest in the public the fee to the streets and public grounds named and designated upon the plat as such; and this seems to be the result of the decision in the case of *The United States v. The City of Chicago*, 7th Howard, 185. That decision could not have been made if the Supreme Court of the United States had supposed that the title in fee of the streets was vested in the city of Chicago, as representing the public. It was a question that necessarily arose in that case, and one sub-

mitted and certified up to the Supreme Court, and upon which the decision of that court was required and given.

It seems to me that a distinction can be taken between a dedication which is general, without any restriction or limitation, and a special dedication for a particular purpose. Here the condition annexed to the dedication was, "*public ground forever to remain vacant of buildings*," The United States, therefore, hold the title in fee to the land subject to the dedication which had been affixed to it, having, however, no control over it inconsistent with the purpose for which it was dedicated, but, as I apprehend, still having entire control over it consistent with that purpose.

Then, there being this special dedication, the question is as to the power of the general public over it, either the city of Chicago, for certain purposes, representing the rights of the public, or the State of Illinois, for other purposes, so representing them, and of course independent of the power exercised over it as public ground merely, about which there is no controversy here.

It is the undoubted right of every person owning property to dispose of it in such a manner as he chooses, consistently with law and public policy. It is therefore the right of every property holder, unless there is some law or some public policy which prevents, to dedicate his property to public use, general or special; and I apprehend there could not be and was not any law, state or federal, to prevent the special dedication of this property in the way in which it was designated on the plat by the agent of the Government. That being so, when property is thus dedicated what are the rights of the public over it? Can they change the object and purpose of the dedication? Would not this be interfering with the undoubted right of every person to dispose of his property as to him shall seem fit?

There may be, perhaps, some force in the argument which declares that when property is dedicated generally to the public, without specifying the particular purpose, the public may use it for one purpose at one time, and for another at a different time, but where the owner of property dedicates it to a partic-

ular public purpose, being not inconsistent with the law or public policy, I deny the right of the state or of the municipality to divert it from that purpose, except under the general authority which the public has to take property for public uses, which is sometimes termed the right of eminent domain. If an individual shall grant a lot of land or square in a city, for the purpose of constructing a school house upon it, or a church, or an institution of science, or for any useful public purpose, that property cannot be taken, as I apprehend, by the public, except in the same way that any property can be taken. In one sense, the property of every man, of course, is subject to the control of the Government, but then, when thus subject to the Government, it is in conformity with law, and in our system under the adjudication of the law by the courts. It is not alone by a simple stroke of legislation, and I think none of the authorities that have been cited are inconsistent with this principle.

The case of *Williams* against the *New York Central Railroad* company, 16 New York, 97, proceeds upon the correctness of this doctrine. There the owner of land dedicated a portion of it to the use of the city of Syracuse as a public street. The Legislature undertook to grant to the railroad company a portion of the street for a railroad track. The Court of Appeals of New York held that it could not be done without accountability to the owner of the street. And although some cavil is made with this decision in the case of *The People vs. Kerr*, 27 New York, still the principle of it is conceded.

The case of Wellington and other petitioners, reported in 16 Pickering, 87, is in conformity with this doctrine. The opinion of chief Justice Shaw proceeds upon the basis that there had not been a diversion, by the act of the Legislature, of the land from the public use to which it was appropriated by the owner. That undoubtedly is a strong case, where the question distinctly came up.

The case of *Wager vs. The Troy Union Railroad Co.*, 25 New York, 526 is also in conformity with this principle.

In fact, what safety would there be in any other rule than

this? And when it is enunciated, coupled with the qualification that the state may take the land for public purposes under the right of eminent domain, there certainly cannot be any objection to it; *salus populi est suprema lex;* and this leaves the right of the individual over his property, and the rights of the state, in harmony with each other, maintaining in full force the right of the owner to annex such qualification to the disposition of his property as he chooses, subject, however, to that supreme law, which looks to the safety of the state and which authorizes the appropriation of the property when that safety demands it.

Now what is done in this case? Is the action of the state or of these defendants in conformity with this principle? It grants to these companies the right of the State of Illinois in this land. What is that right? It can only be independent of the easement, and so far as the owner of the property is concerned, the right to appropriate it for public use in conformity with law. Has the Legislature of the state the right to divert land which has been appropriated to a special purpose from that purpose, and say that in consequence of that they will give such a compensation to the owner? Is not this what this act does, to all intents and purposes?

It declares that, in consequence of the grant made by the State of Illinois, these defendants, the railroad companies, shall pay to the city of Chicago $800,000 only, while the bill alleges the value of even that part of the grant inclosed between Madison and Randolph streets, to be $2,500,000. It is certainly a diversion, so understood, so contemplated, and not denied by counsel, from the purpose for which the land was originally dedicated.

If this was not the object and purpose, for what were the $800,000 to be given to the city of Chicago?

True, it is said that there are rights affecting this property. There is the right of the owners of lots abutting upon the property; the right of prospect; the right of air and view. That is one thing. But has not the public, in relation to the various streets and public grounds, certain rights as well as

owners of lots abutting upon the streets, public squares? And is that right, by a mere stroke of the pen, to be taken away from each individual of the public, where the ground is dedicated to a special purpose? In other words can a mere legislative enactment close up our public streets and parks, and squares? Is there nothing required to give effect to it, and is the individual to be left without any other redress, except what may arise indirectly by an action against the wrong-doer, which shall sound in damages?

This will not be claimed. This is not claimed, as I understand, in this case.

It is said that all that is granted by this legislative act is the rights of the public; that the rights of individuals have to be affected by some other proceeding. That may be true. There can be no doubt, I apprehend, of the right of every individual owner who may be injured by the wrongful act of these defendants to proceed against them for that injury, and to apply to the court for redress. What is the result in the meantime? The land thus taken, if used for the purpose claimed under this law, can be built up. In other words, the condition annexed to the dedication, declaring that this land was forever to remain vacant of buildings, can be nullified by the construction of buildings and depots. It would seem as though there should be a preventive remedy which may arrest this violation of the dedication, rather than to leave the parties to the inadequate redress of an action at law and sounding in damages, merely.

Then, I hold that these principles are true in this case: That the United States remained the owner of this land, subject to the use conferred upon the public by the dedication that was made; that neither the state nor the city has a right to divert the land from the special dedication thus affixed to it, except by the exercise of the right of eminent domain, which must be, not alone by an application to the Legislature, but by an application in conformity with the law, and where the rights of the parties can be ascertained.

Injunction granted.

If ground is surveyed and laid off for a public place, and sales made in reference thereto, that amounts to a dedication to the public. *Godfrey vs. City of Alton*, 12 Illinois, 29, *Trustees of Watertown vs. Cowen*, 4 Paige 510.

No particular form is necessary to constitute a valid dedication. *Marcy vs. Taylor*, 19 Illinois, 634; *Waugh vs. Leech*, 28 do., 448; *Canal Trutees vs. Havens*, 11 do., 554; *Mardy vs. Gibson*, 11 do., 312; *Drummer vs. Selectmen of Jersey City*, 1 Spencer, 86; *Rector vs. Hartt*, 8 Missouri, 448; *Woodyer vs. Hadden*, 5 Taunton, 125; *Poole vs. Huskinson*, 11 Meeson & Welsby, 827; *City of Cincinnati, vs. White's Lessee*, 6 Peters, 431; *Post vs. Pearsall*, 22 Wendell, 425; *Knight vs. Heaton*, 22 Vermont, 480; *Hobb vs. Inhabitants of Lowell*, 19 Pickering, 405.

Nor is it necessary that the fee be diverted. *Kelsey vs. King*, 33 Howard Practice R, 39.

Property once dedicated cannot be aliened or diverted. *City of Alton vs. Illinois Transportation Company*, 12 Illinois, 38; *Proctor vs. Town of Lewiston*, 25 do., 153.

A plat of an addition to a town, not executed, acknowledged and recorded in conformity with the statute of the state, operates as a dedication of the streets to public use, but not as a conveyance of the fee to the corporation. *Banks vs. Ogden*, 2 Wallace 57.

The exhibition or publication of a map of a town with streets and squares marked thereon is evidence of a dedication to public uses. *Lownsdale vs. City of Portland*, 1 Oregon, 397; *Chapman vs. School District No.* 1, Deady 108.

If a tract of land be dedicated to the public, as an open square, the public acquire a vested right in it for such purpose. *McConnell vs. Lexington*, 12 Wheaton 582; *New Orleans vs. The United States*, 10 Peters, 662.

Cincinnati vs. White, 6 Peters, 431; *Sergeant vs. Bank of Indiana*, 4 McLean, 339.

The Government in laying out the city of New Orleans left an open space in front of the houses, and toward the river marked *quai* on the plat; *held*: a dedication to public purposes. *Municipality No.* 2 *vs. Orleans Cotton Press*, 18 Louisiana, 122. See also, *City Council of Lafayette vs. Holland*, Id., 286; *Pulley & Irwin vs. Municipality No.* 2, Id., 278; *Barrett vs. New Orleans*, 13 Louisiana Annual, 105. [*Reporter*.

PARTRIDGE vs. SMITH.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—SEPTEMBER, 1869.

IN EQUITY.

MISDESCRIPTION IN DEED.—NOTICE.

1. A deed filed for record, misdescribing the premises—the numbers of the township and range having been transposed, but there being in the county no premises corresponding to the description in the deed—is sufficient notice to put a purchaser upon inquiry, and charge him with knowledge that the premises had been conveyed.
2. The misdescription is not of such a character as to do away with the effect of the registry laws.
3. A mortgagee of real estate is a *bona fide* purchaser, even though the mortgage was given to secure a pre-existing debt.

On the 9th day of October, 1867, in the city of New York, Alice B. Smith executed to the complainants a mortgage on an eighty-acre tract of land in McHenry county, Illinois, which was described as follows: "The south half of the south-east quarter of Section 15, in Township No. 8, north of Range No. 43, east of the 4th Principal Meridian, being in the county of McHenry and state of Illinois."

This mortgage was given as security for an indebtedness already over due.

On the first of October, Mrs. Smith had executed a deed of trust to Wm. C. Goudy, to secure a debt due the Merchants', Farmers' and Mechanics' Savings Bank of Chicago. This deed properly described the premises, but was not filed for record until October 16th. It was not shown that the complainants had actual knowledge of this deed.

This was a bill to foreclose the mortgage, making the bank a party defendant, who answered, claiming priority by virtue of the deed of trust.

Williams & Thompson, for complainants.

Goudy & Chandler, for defendants.

DRUMMOND, J.—It would be known, of course, at once, to any person familiar with the government surveys, of which the court takes judicial notice, that there is no such tract of land in McHenry county as the one described in the mortgage. It is claimed on the part of the plaintiffs that the land should be "the south half of the southeast quarter of section 15, in Town 43, north Range 8, east of the Third Principal Meridian." This mortgage was filed for record in McHenry County, on the 14th of October, 1867. Mrs. Smith was indebted to the mortgagees, the plaintiffs, for a bill of goods which had been previously sold, and she being in New York at that time, they asked for some security upon this bill, and at their request this mortgage was executed, she stating at the time, that as she was to give a mortgage, although the debt had been due for some time, she would ask for thirty days. A thirty day note for $2,204.36 was accordingly executed, to secure which the mortgage was given.

At the time this mortgage was executed and given to the plaintiffs, Mrs. Smith had in point of fact, on the 1st day of October, 1867, nine days before, executed a deed of trust to William C. Goudy, to secure a debt that was due by her, to the Merchants,' Farmers' and Mechanics' Savings Bank, in this city, for the sum of $1,200, money loaned by that institution to her; but this deed of trust was not filed for record in the Recorder's office in McHenry county, where the land was situated, until the 16th day of October, two days after the mortgage to the plaintiffs was filed for record. Hence the controversy between the parties. The question is, which takes the priority over the other.

Of course, if the mortgage to the plaintiffs had truly described the land, and there was no notice to plaintiffs of the prior deed of trust, the registry laws would place the question beyond controversy, but the misdescription of the land in the

mortgage gives rise to the controversy. There is no question made in the case but that Mrs. Smith intended to mortgage to the plaintiff the south half of the south-east quarter of Section 15, Town 43 north Range 8, east of the Third Principal Meridian, in McHenry county. The description was inserted in the mortgage as the witnesses say, at the instance of Mrs. Smith herself, and as given by her in the city of New York, and it is presumable to parties who were unacquainted with the fact that there was no such land as thus described in McHenry county.

Mrs. Smith states that in going from the hotel to the office of the Messrs. Cottrell, she informed one of the plaintiffs that she had borrowed money on this land, and had given a deed of trust, and if that fact were established, of course it would put an end to the controversy. But three witnesses expressly state that she told them that there was no encumbrance whatever upon the property. Their whole conduct at the time is inconsistent with their knowledge or understanding of this communication. If she did make any statement, it is clear that they have either testified untruly, or they did not understand it. Mr. Ballard, the only one of the plaintiffs who had anything to do with it, is the one that went to the hotel where Mrs. Smith was, and she accompanied him to the office of the attorneys, and it must have been to him that communication was made; and his testimony, as well as that of both of the Cottrells (the attorneys), is entirely inconsistent with such a communication being made; so the court must assume that the weight of the evidence is that there was not notice to plaintiffs of the existence of this prior deed of trust, and the case must be decided on that hypothesis.

That being so, what is the law upon the subject?

Here was a deed of trust executed the 1st of October, 1867, to Mr. Goudy, and a mortgage on the 9th of the same month to these plaintiffs, to the same land, the latter having no knowledge of the existence of the prior deed of trust.

As between these parties I understand the law to be that the mortgage and deed of trust take effect from the time that they are filed for record. As already stated, the defendants concede

this, if the property had been truly described in the mortgage, and admit that if the mortgagees had no notice of the prior deed of trust, the mortgage would be prior in point of law to the deed of trust.

Then, these two instruments having taken effect from the time they were filed for record, when the deed of trust took effect on the 16th day of October, what was the condition of the property? There was a mortgage upon the record, or filed for record, which is the same thing, two days before, by Mrs. Smith to plaintiffs, of a tract of land in McHenry county, described, as the south half of the south-east quarter of Section 15, Town 8, north Range 43 east of the Fourth Principal Meridian, and the savings bank and Mr. Goudy are presumed to know that fact. With this knowledge, the question is whether there was not, upon the record, enough to put a prudent man upon inquiry in order to determine whether Mrs. Smith had not previously mortgaged this property covered by the deed of trust; and I think there was.

It may be admitted—and I think the authorities go that far—that if there had been any land in McHenry county to which this description would apply, it would not be the duty of the parties to trace up and determine what the actual truth was; but, upon a mere inspection of the record, which these parties are presumed to have seen, it would appear that Mrs. Smith undertook to mortgage a particular tract of land in McHenry county; that it was east of the fourth principal meridian; that it was in Town 8 north; that it was in range 43 east. The inquiry would naturally be, what does this mean? There is no Fourth Meridian in McHenry county; there is no Range 43 east. In point of fact the range and town are simply transposed. It should be Town 43 instead of Range, and Range 8 instead of Town. I think that, with this before them there were facts from which they could infer, or any prudent man might infer, that this property upon which their deed of trust operated, was encumbered, and that encumbrance was upon the record two days before their own. The property was actually mortgaged. It was the intention of

the parties that it should be mortgaged. There is simply a misdescription of the property. The question is, whether it is of such a character as to do away with the effect of the registry laws as against a person whose deed took effect subsequent to the recording of this mortgage. I think there was enough upon the record to put a prudent man upon inquiry and compel him to follow it up and to affect him with the consequences of that pursuit.

That being so, the only other question in the case is, whether these plaintiffs were *bona fide* purchasers or mortgagees.

It is claimed on the part of the defendants that they were not, because the mortgage was given for a pre-existing debt. The authorities upon that point are undoubtedly in conflict, but this court has always held that a pre-existing debt constitutes a party a *bona fide* purchaser in the case of real estate, and a *bona fide* holder of a note in the case of a transfer of a note. It is claimed on the part of the defendants that the Supreme Court of the state has settled this question the other way in the case of *Metropolitan Bank vs. Godfrey* in 23 Illinois 579. How they would decide it now, since the case of *Manning* v. *McClure* in 36 Illinois, 490, I am not prepared to say. In this last case they hold that an indorsee was a *bona fide* holder of a promissory note, although he took it for a pre-existing debt, and that latent equities between the maker and payee did not apply to him. I have however, a decided opinion on this point, and shall rule always, until I am corrected by the Supreme Court of the United States, that the giving of a security for a pre-existing debt does not, in itself, prevent the party to whom it is given from being a *bona fide* holder ; and does not prevent it from being a *bona fide* security.

That being so, I think the plaintiffs have the right secured to them by the statute of having their mortgage first satisfied.

The decree will be accordingly.

A description "two entire sections of land in the marine settlement and state of Illinois, and patented to the said John Rice Jones," has been held sufficient, as upon examination it could have been ascertained which two sections had been patented by said Jones. *Choteau vs. Jones*, 11 Illinois, 300.

The following description has also been held suffleient: "a tract situated in the county of Hancock, in the state of Illinois, containing 160 acres, be the same more or less, being northwest 26, north 5, west 8 of the county lands, and being the same quarter-section patented by the United States to Edward Crow." *Dickenson vs. Breeden*, 30 Illinois, 279. Also a description omitting the range and base line, as from the description given a surveyor could locate the land. *White vs. Hermann*, 51 Illinois, 243.

That a mortgagee is a *bona fide* purchaser, see *Bayley vs. Greenleaf*, 7 Wheaton, 46; *Clark vs. Hunt*, 3 J. J. Marshall, 553; *Cole vs. Scott*, 2 Washington, Va. 141; *Wood vs. Bank of Kentucky*, 5 T. B. Monroe, 194; *Duvall vs. Bibb*, 4 Hening & Munford, 113; *Newton vs. McLean*, 41 Barbour, 235; *Frisbey vs. Thayer*, 25 Wendell, 396; *Pond vs. Clarke* 14 Connecticut, 334; *Servis* vs. *Stevenson*, 2 Hall, 63.

A person taking a note or bill in satisfaction of a precedent debt, is protected as a *bona fide* purchaser. *Russell vs. Hadduck*, 3 Gilman, 233; *Foy vs. Blackstone*, 31 Illinois, 538; *Saylor vs. Daniels*, 37 do.. 331. [*Reporter*

SAYLES vs. HAPGOOD.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—OCTOBER TERM, 1869.

IN EQUITY.

1. When a man conceives a certain machine, no one knows except himself. When he describes it, no one knows but himself, and those to whom he describes it. This is, from the nature of the case, the testimony upon which reliance must be placed.

2. Priority of conception followed by a prior patent, gives priority of right.

3. Letters Patent for an improvement in cultivators, granted to James Dundas, February 8, 1859, and re-issued, are void for want of novelty, the same invention having been conceived and a machine constructed by one Marsh, before the conception of the invention and the construction of a machine, respectively, by Dundas.

This was a bill in equity, filed by the complainant, as assignee of James Dundas, to restrain the defendants from infringing letters patent for an improvement in cultivators, granted to James Dundas February 8, 1859, re-issued October 16, 1866.

The claim of the original patent was as follows: "The arrangement of the half shovels, w, w, in connection with the bars, h, h and i, to be moved to the right or left at pleasure of the operator."

The claims of the re-issued patent, re-issued October 16th, 1866, and assigned to complainant, were as follows:

First. The combination in a straddle-row cultivator of the following instrumentalities, viz: the two wheels, frame and a series of plows arranged in two gangs, with a central space between the gangs so as to till the soil simultaneously at both sides of a single row of plants which the machine straddles; all of these operating in the combination substantially as set forth.

Second. The combination in a straddle-row cultivator of the following instrumentalities, viz: the two wheels, frame, the series of plows arranged in

two gangs as aforesaid, and seat for the driver; all of these operating in the combination substantially as set forth.

Third. The combination in a straddle-row cultivator of the following instrumentalities, viz: the two wheels, frame, the series of plows arranged in two gangs as aforesaid, and movable stocks; all operating in the combination so that while the wheels limit the penetration of the plows, the inner plows of the two gangs may be moved laterally to avoid the plants that are out of line in the row, substantially as set forth.

Fourth. The combination in a straddle-row cultivator of the following instrumentalities, viz: the two wheels, frame, the series of plows arranged in two gangs as aforesaid, movable stocks as aforesaid, and drivers seat; all operating in the combination substantially as set forth.

Fifth. The combination in a straddle-row cultivator of the following instrumentalities, viz: the two wheels, frame, the series of plows arranged in two gangs as aforesaid, drivers seat, and a connection between the movable plows, all operating in the combination substantially as set forth.

Sixth. The combination in a straddle-row cultivator of the following instrumentalities, viz: the wheels, frame, series of plows arranged in two gangs as aforesaid, and mechanism to permit the plows to be raised relatively to the treads of the wheels, all constructed and operating in the combination substantially as set forth.

West & Bond and *George Harding*, for complainant.

Goodwin, Larned & Towle, for defendants.

DRUMMOND, J.—The improvement claimed in the patent consists, in substance, of an arrangement by which rows of corn are hoed or tilled at one operation through fixed shovels combined with shovels moved laterally, and with devices for raising or lowering them at the will of the operator, who rides on the machine, which is borne on two wheels, with an axle high enough to pass over the rows of corn.

Various questions were discussed on the argument, but the only one upon which any stress was placed, or about which there was any serious controversy, was whether Dundas was the first and original inventor of the improvement in the cultivator, as claimed by him. No point was made upon the identity of the machines manufactured by the defendants and that patented to Dundas, but it is claimed on the part of the defendants that a man by the name of Hiram H. Marsh first invented the improvement claimed by and patented to Dundas.

The conception first arose in the mind of Dundas in June or July. 1850, (in his deposition he says June), and it appears from the deposition of Dundas, and of his son, that, at that time, the father gave a description of a cultivator to the son sufficient to enable the latter to construct it. The son says that he began to build one in the winter of 1850, and that he and his father completed the wood work of it in the winter or very early in the following spring, but that it was not ironed until about the first of June, 1851.

This machine, thus constructed by Dundas, and his son, was used during the season of 1851, in June or July.

Dundas made application for a patent on the first of August, 1851, but failed in his application at that time, and the patent was not issued until 1859.

This is the state of the evidence as to the invention of Dundas.

Marsh came to Illinois, it would seem, sometime in 1847 or 1848. He married on the 15th of October, 1849, and he and his wife went to live on a farm on Centre Prairie, about ten miles from Ottawa. Mrs. Marsh says that before their marriage, Marsh told her of an improvement in a cultivator which he had invented, and he described it to her. Jarvis Lawrence says that he moved into the neighborhood where Mr. Marsh was in March, 1850, and that Marsh, in the spring or summer of 1850, spoke to him of his improvement in a cultivator, telling him how it would operate. James P. H. Bates also says that Marsh boarded with him in 1847-8, and that at different times he used to speak of constructing a machine for cultivating corn by riding and straddling the rows with wheels.

Uri Weaver also states that he became acquainted with Marsh in 1847 or 1848, and that he also spoke to him in May, 1850, of an improvement that he had invented in a cultivator for hoeing and tilling corn, that he had described it to him by taking sticks and explaining how he could make it operate.

This is substantially the testimony on the part of the defendants as to the conception of the improvement in the cultivator by Marsh, and of the description which he gave of it from time to time, and to different persons.

In the fall of 1850, Marsh and his wife went to Salem, Tippah county, Mississippi, and Marsh made a contract to teach school, which contract is in evidence, and is dated the 5th of December, 1850, and consequently, about the time of which there can be no mistake.

In the month of January, Marsh described to a mechanic of Salem, by the name of Ray, the kind of machine he had in his own mind, which he claimed was an improvement upon a cultivator, and gave instructions to him as to its mode of construction, and a machine similar to the one introduced in evidence on the part of the defendants, and referred to as model "B," was completed under his direction, and it was successfully operated in the presence of numerous witnesses, in a certain field at or near Salem, early in March, 1851, so that at that time, Marsh had carried his conception and ideas into practical effect by the construction and operation of an improved cultivator. The cultivator was used before the corn was planted in the spring. It was also used after the corn was planted and was considerably advanced, and the evidence is that corn was usually planted in that vicinity from the 10th to the 20th of March.

Marsh and his wife left Mississippi and came North during the year 1851, and, by his direction, this cultivator was shipped to Illinois, but owing to some cause it never arrived here. What has become of it is unknown. During all this time, while Marsh had the project of the cultivator in his mind, and after it was constructed, it appears that he intended to make application for a patent, and on the 1st of July, 1851, he made the necessary affidavit, with the view of procuring a patent, and his application was filed in the Patent Office on the 5th of July. The claim, however, being rejected, on the 30th of July, 1851, and a patent refused, he became discouraged and the claim was not prosecuted in the Patent Office.

This seems to be the state of facts with reference to the conception, description, construction and practical operation of the invention of Marsh, independent of his own testimony.

When comparing his testimony with the testimony of other

witnesses in the case, it would seem that his memory is not reliable as to dates. In June 1864, he told Mr. Furst and Mr. Bond that he had made the invention about three months before the application for his patent, which application, as we have already seen, was in the beginning of July. Now it is clear that he is mistaken as to this, because the testimony of the construction and use of a machine as early as February or March, 1851, seems conclusive. It also appears that Marsh made an affidavit on the 24th of March, 1866, in Chicago, in which he says that in January or February, 1851, he conceived in his own mind a plan for a corn cultivator, but did not make a drawing or model of the same, or fully explain the same to any one until the month of May of the same year, which it is clear was long after he had actually caused his cultivator to be constructed, and besides, there is a letter in evidence from Munn & Co. dated the 31st of December, 1850, which refers to one from Marsh of the 17th of the same month, making inquiry as to the steps necessary to be taken toward securing letters patent for an invention, which must have referred to this improved cultivator, so that there can be no doubt that Marsh was mistaken in the dates mentioned in his affidavit of the 24th of March, 1866, just mentioned.

These are the facts as set forth by the evidence on the part of the complainant and of the defendants, and what is the truth in relation to them?

And *first*, The application in the Patent Office being a matter of record there can be no doubt, as to the time it was made. Dundas' application was in August, 1851. That of Marsh was in July of the same year,. Then Marsh was prior in point of time, in the Patent Office.

Secondly, as to the construction and practical operation of the machine. It is not claimed, and the proof does not establish, on the part of the complainant, that Dundas brought a practical operating machine into being before sometime during the season of 1851, and when it was considerably advanced. The testimony of the son is, as we have seen, that the iron work was not completed until June, 1851, and it does not

seem to have been operated until the summer of 1851. This fact depends mainly, if not exclusively, upon the testimony of Dundas and his son, and, of course, is liable to error.

When was the machine of Marsh finished? As to this, if there is any reliance to be placed upon testimony, there can be no doubt whatever. Marsh was in Mississippi in December, 1850. That time is fixed beyond all controversy. Then Marsh brought into being a machine which operated successfully before that of Dundas. He is prior, therefore, in point of time in the construction and operation of the machine.

The only remaining question is, *thirdly*, as to the time of the conception of the two machines. Here all we have on the part of Dundas is the testimony of the father and of the son. About this, of course, there may be room for forgetfulness, mistake or error. When a man conceived a certain machine, no one knows except the man himself; when he described it no one knows except himself and the person to whom he describes it. We have to rely upon their testimony in order to determine. If it were clear, in view of the fact that the invention was followed up by the issuing of the patent to Dundas that he was prior in point of conception, then, perhaps, he would be entitled to the monopoly which is claimed by the plaintiff in this case. But we have the same sort of evidence and, as it seems to me, even stronger, as to the conception of the Marsh machine. There are more witnesses who testify to the priority of the conception on the part of Marsh than there are to that on the part of Dundas. I have referred to the various witnesses who state that Marsh communicated the conception of this machine, and that it was, in point of fact, prior to 1850. Mrs. Marsh distinctly says that it was before her marriage. Of course, you may say she does not tell the truth; but the date of her marriage is a thing about which she would not be very apt to be mistaken, and she could refer to any event in connection with that, and speak of it with reasonable certainty. So as to Mr. Lawrence and Mr. Bates; the time when they came to the neighborhood in

which Marsh resided, they would not be apt to forget. On the whole, I think the weight of the evidence in this case is, that the conception and construction of the Marsh machine was prior in point of time to that of the Dundas machine, and, therefore, that Dundas was not the first and original inventor of the improvement in a cultivator which was patented to him.

The bill will consequently be dismissed.

MAJOR vs. HANSEN.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—NOVEMBER, 1869.

ALTERATION IN NOTE.

1. A *bona fide* holder of a promissory note from which the place where it was payable has been erased by an unauthorized person and without his knowledge can recover against the maker.
2. The alteration is not material, and enlarges but does not limit the rights of the maker.

Assumpsit upon a promissory note for $1.500 in gold "payable at the Commercial Bank of Canada" These words were erased, and the proof showed that this had been done after the note left the maker's hands, and without his knowledge or consent, but there was nothing to connect the plaintiff with the alteration, and he was a *bona fide* holder for value.

Beckwith, Ayer & Kales, for plaintiff.

Scoville, Bailey & Brawley, for defendant.

DRUMMOND, J.—There is no material alteration of this note. The effect of the words "payable at the Commercial Bank of Canada" was to give the defendant the right to discharge his obligation by tendering the money at the place designated, and the only effect of erasing them was to give him the additional right of tendering the money wherever he might find the plaintiff. The rights of defendant are thereby enlarged, and in no respect limited, and he cannot complain unless he can in some manner connect the plaintiff with the alteration, or can show that he tendered the money at the place stated and has been damnified. If these words had been added the case would have been different for that would have been a material alteration—a limitation of the rights of defendants.

In this case the maker has shown no injury to himself from the erasure of these words, and the note being negotiable the responsibility rests upon him to prove his equities.

Judgment for plaintiff.

For general doctrine of alteration of instruments, consult 2 Parsons on Contracts, 716-724. [*Reporter.*

THE MILWAUKEE BELLE.

DISTRICT COURT.—DISTRICT OF WISCONSIN.—NOVEMBER TERM, 1869.

IN ADMIRALTY.

JETTISON.

1. Goods laden on deck with consent of the shipper under a bill of lading excepting "dangers of navigation," and necessarily jettisoned, do not make a case for general average.

2. The fact that the shipment on deck was sought by the master for the purpose of trimming his vessel, held not to be material.

Libel for contribution for loss by jettison of a quantity of pig lead, shipped on board this schooner at the port of Racine, in the State of Wisconsin, to be transported to the port of Buffalo, in the State of New York. By the bill of lading, the pigs of lead were shipped on deck, in good condition, to be delivered in like good order, the dangers of navigation excepted. The schooner was laden with wheat in bulk.

Cary & Rea, for libellants.

Emmons & Van Dyke, for respondents.

MILLER, J.—It is agreed between the advocates of the parties that the storm was of force and violence sufficient to render the jettison necessary. The proof sustains the allegation that the master solicited the lead for the purpose of trimming his vessel. The proof does not establish a custom to ship lead on deck. That has been done in several instances for the purpose of trimming grain bearing vessels, but to establish a custom derogating from the general law, it is not enough to prove that the act has been frequently done. It must be proven to be so generally known and recognized, that a fair presumption arises

that the parties in entering into their engagement, do it with reference to the custom, and tacitly agree that their rights and responsibilities shall be determined by it. This case does not rest on custom, there being an express agreement between the freighter and the master of the vessel, that the lead should be stowed on deck.

The question presented for the consideration of the court is, is the loss of the lead by the jettison a general average loss? The general cargo having been delivered at the port of destination, upon payment of the freight, the demand is against the vessel alone for her proportional contribution. Under the view taken of the point presented, I will not consider whether this libel can be maintained against this vessel, after delivery of the cargo.

It appears that the master having ascertained that his vessel was not trimmed, applied to the agent of the owner of the lead, to ship it on deck, for the purpose of trimming the vessel for the voyage, and thereby rendering her sea-worthy. From this fact negligence is not chargeable to the master, in respect to putting the vessel in trim. The jettison was rendered necessary by a peril of the sea, for the safety of the vessel and cargo and was a loss by the peril of the sea.

It is a general and an ancient rule of the law of shipping that goods shall not be carried on deck. Reasons for this rule are, that goods placed on deck are more liable to be lost by being swept overboard, and to damage by water, and endanger both ship and cargo, as the weight is put far from the hold, and thereby makes the vessel less stable and less manageable, and more apt to labor in a heavy sea. And it encumbers the deck and embarrasses the crew in working a sail vessel, and perhaps the common safety sometimes may not require jettison if lading were not on deck to bring the dangers on the vessel, or contribute to enhance them.

The rule is also a general rule, that goods laden on deck and jettisoned are not contributed for, and such is particularly the rule when goods are laden on deck by consent of the shipper.

I have had this matter under consideration in former cases,

and must dispense with reference to the very numerous cases affirming this rule. Maritime orders and rules, both ancient and modern, recognize the distinction between cargoes placed on deck with consent of the freighter, and cargoes under deck. They do not give a recourse against the master, the vessel, or the owner. The admiralty courts of England and America have almost uniformly treated the owner of goods on deck with his consent, as not having a claim on the master, in case of jettison, although bound to contribute.

This being a proceeding against a sail vessel, I shall not enter upon the consideration of some modern judgments against vessels propelled by steam. The case of *Lawrence* v. *Minturn*, 17 Howard, 100, is referred to as a leading case of binding authority. The ship Hornet was libelled for non-delivery of two steam boilers and chimneys shipped at New York, on deck by special agreement, and consigned to libellants in San Francisco. It being discovered on the voyage, that the ship could not be navigated with safety in a storm, the deck load was thrown overboard. The facts in the case show that the jettison was justifiable, and the loss occasioned by the peril of the sea. The court says "This bill of lading declares that the property is to go on deck. It excepts perils of the seas. The exception must be construed with reference to the particular adventure, which the contract of the affreightment shows was contemplated by the parties. Under this bill of lading, the question is, not what in other circumstances could be deemed a peril of the sea, but what is to be deemed such when operating on this vessel, with this deck load. If a very burdensome cargo like iron is taken on board, and heavy weather met with, and jettison made, it would not be a ground of claim against the owner that the weather encountered would not have been sufficient to justify a jettison, if the cargo had been cotton. And when this freighter consented to place on the deck of this ship his boilers and chimneys, weighing upwards of thirty tons, not distributed about the deck, but lying in a small space, must he not be taken to have known that their necessary effect might be to embarrass the sailing of a ship in a gale of wind, and cause her to

labor in a heavy sea?" The libel was dismissed. In this case libellants having shipped on deck eleven hundred and sixty pigs of lead weighing about forty tons, they consented that the vessel might thereby be rendered less manageable, and more liable to labor in a storm, and they, and not the vessel, must bear the loss of a portion of the deck load by the necessary jettison.

It is contended that in equity the vessel should contribute for the loss, as the deck load was used in putting her in trim for sea. That is begging the question. I cannot enter into consideration of the inducement to the contract of the parties.

The libel will be dismissed.

See *The Wellington*, Volume 1 of this Series, p. 279, and cases there referred to.

The general rule that there is no contribution for goods laden on deck is held in *The Paragon*, Ware 322; *Lennox vs. United States Ins. Co.*, 3 Johnson's Cases, 178; *Johnston vs. Crane*, 1 Kerr, (N. B.) 356; *Wolcott vs. Eagle Insurance Co.*, 4 Pickering, 429; *Cram vs. Aiken*, 13 Maine, 229; *Taunton Copper Company vs. Merchants' Insurance Company*, 22 Pickering, 108.

In *Barber vs. Brace*, 3 Connecticut, 13, it is held that a parol agreement that goods may be stowed on deck, made after the delivery of the bill of lading, is a good defense to a loss occasioned by such stowage.

But when it is customary to carry a certain class of goods on deck the rule has been relaxed. *Gould vs. Oliver*, 4 Bingham, 776; *Brown vs. Cornwell*, 1 Root, 60; *Rogers vs. Mechanic's Ins. Co.*, 1 Story, 603; *Toledo Fire etc. Company vs. Spears*, 16 Indiana, 52. And in *Millward vs. Hibbert*, 2 Gale & Davison, 142, the owners of pig lead loaded on deck, having been allowed contribution in general average on showing a usage so to carry, the ship-owner recovered against the underwriters; and Denman, C. J., reviewing the English authorities, says that they fall far short of the rule that owner of deck cargo can in no case recover in general average.

A distinction has also been made between sail vessels and steamers, the distinction going to the reason of the rule. *Hurley vs. Milward*, 1 Jones & Carey, 224; *Gillett vs. Ellis* 11 Illinois, 579; *Harris vs. Moody*, 4 Bosworth, 210, approved by the Court of Appeals in 30 New York, 266; *Merchants' etc. Insurance Co. vs. Shillito*, 15 Ohio State, 559.

The Supreme Court have entirely settled the rule that a clean bill of lading imports a contract that the goods shall be stowed under deck, and that parol evidence that they were to be stowed *on* deck, is inadmissible. *The Delaware*, 14 Wallace, 579. This was a case of jettison of pig iron, and the court expressly limit their decision to the case where no usage or custom of a particular trade is shown sanctioning a stowage on deck, no proof of such usage having been introduced in that case. [*Reporter.*

THE MAITLAND.

DISTRICT COURT.—DISTRICT OF WISCONSIN.—DECEMBER TERM, 1869.

IN ADMIRALTY.

LIEN FOR REPAIRS.

1. Repairs upon a vessel in winter quarters in a foreign port, done by contract with the owner, there being no express claim at the time of a lien upon the vessel, and no immediate necessity for such repairs, do not constitute a maritime lien.
2. The power of the owner and master in binding the vessel considered.
3. Various cases distinguished and commented upon.

Libel for repairs. It is alleged in the libel that on the 15th of February, 1869, while this vessel was at the port of Milwaukee, her owner or agent represented to libellants that she stood in need of repairs in order to make her sea-worthy, and competent to proceed on her intended voyage, and requested them to furnish such materials and supplies; they were supplied by libellants on the credit of the vessel, the said owner or agent not having either money or credit to purchase said materials and supplies, which were suitable, proper and necessary to enable the vessel to depart in safety upon her intended voyage. The vessel's home port was Buffalo.

John H. Moore, of Buffalo, claimed the vessel, as owner, subject to a mortgage of $10,000, the mortgagee having power to take possession of her at any time.

He alleges that before the time the repairs were done by libellants, the vessel had been stripped, and was laid up in winter quarters in the port of Milwaukee, without any intention or possibility of her being employed until navigation should open in the ensuing spring; that after the close of navigation in the fall of 1868, and after the vessel was laid up in winter quarters, claimant, believing that certain repairs would improve her condition for the next season of navigation,

and raise her rate, entered into correspondence with libellants as to the price of such repairs, and in January, 1869, received from libellants a proposition in writing to make such repairs. The proposal was required to be accepted by claimant within ten days. Claimant answered in writing: "I accept your offer, and will give five hundred and fifty dollars to do the following work on barque Maitland," (describing the work to be done, &c.) Claimant denied that the repairs were made on the credit of the vessel alone, as propounded in the libel, or that they were necessary to enable her to proceed on her voyage; and he alleged that they were furnished by libellants on his own credit, and that he had money and credit to procure the same.

Emmons & Van Dyke, for libellants.

Finches, Lynde & Miller, for respondents.

MILLER, J. As the issue here raised is one of admiralty jurisdiction, I omit all reference to the portions of the answer and evidence, which relate to the amount of the bill of repairs and the manner of the work.

Further correspondence took place between these parties in the month of January, 1869, respecting additional repairs to the vessel. In a letter of January 23d claimant wrote to libellants: "Enclosed please find my acceptance of your proposition. I understand you make no objection to my former terms, and suppose you accept them, as you say nothing to the contrary. But I don't expect to keep you out of the pay any longer than you wish to. I will not be able to go up now, and will depend on your doing me a good job. I shall ask Mr. Vance to step around and consult when you get the deck off. Please take care of the ropes in the hold. The other work to be done may remain until the captain goes up, except such of the beams as need repairing."

In a letter dated Buffalo, July 16, 1869, claimant wrote to libellants: "Your valued favor of 13th inst. is received, which is accepted." He then directs as to the work, and then

proceeds: "You will have to take acceptances, or some way wait for pay until the vessel makes one trip, unless I can conveniently pay you. I have money that is promised, ample, but I may be disappointed, yet I hope not; but I will strain every point to pay you when you want it. But should I not be able to collect, then I will want the time." Libellants then did the work on the vessel in the port of Milwaukee.

By rule No. 12 of practice in admiralty and maritime jurisdiction it is provided that, "in all suits by material men for supplies, or repairs, or other necessaries, for a foreign ship, or a ship in a foreign port, the libellants may proceed against the ship and freight *in rem*, or against the master or owner alone *in personam*. The home port of this vessel being Buffalo, she was foreign, in the sense of this rule, to the port Milwaukee.

The season of navigation being ended, the vessel was laid up at Milwaukee for the winter. The repairs may have been necessary for putting the vessel in a sea-worthy condition, as a grain-bearing vessel, for the ensuing season. The vessel was not then on a voyage, bearing a cargo, or intending at the time to proceed on a voyage, or trip from Milwaukee to Buffalo or any other port. There was no intention of putting her in employment before the opening of navigation the ensuing spring. Present necessity for the repairs did not exist when ordered or when made. The master did not order the repairs from pressing necessity, nor did he order them at all, but the owner, and that, too, at a time when the vessel was not actually in employment. She might probably as well have been returned to her home port and repaired there as in the port of Milwaukee.

The rule of the admiralty is of ancient date, that a master of a vessel has power to create a lien for repairs and supplies obtained in a foreign port in a case of necessity. The case of *Thomas vs. Osborn*, 19 Howard, 22, and the cases cited in the opinion conclusively establish this rule, without further references. And this power of the master extends to a case where he is charterer and special owner *pro hac vice*. Here

the master is entirely unknown to the libellants as such. The whole negotiation and contracts were between the owner and the libellants. The master had returned to his home in Buffalo before the repairs were contracted for or performed. In the case of *Pratt vs. Reed*, 19 Howard, 359, the steamboat Sultana was owned in Buffalo and employed in trade between that port and other ports of the upper lakes. She was supplied with coal from time to time at the port of Erie, her owner being the master, and present; and of such ownership, Reed, the libellant, had knowledge when he supplied the coal. There was no representation of the necessity of the supplies, other than that they were directed by the master at the times when furnished. When the owner was not present the coal was furnished at the request of the person in command. The bill rendered by the libellant contained a running account of debit and credit through a period of nearly two years, and there did not appear to be any doubt of the necessity of the supplies when furnished.

The court considered it essential for libellant to prove not merely a necessity for the supplies, but also a necessity at the time of procuring them, for a credit upon the vessel. This proof is as essential as that ot the necessity of the article itself. The court says: "The supplies having been furnished at a fixed place, according to the account current, and apparently under some general understanding and arrangement, the presumption is that there could be no necessity for the implied hypothecation of the vessel; there could be no unexpected or unforeseen exigency to require it. For aught that appears, the supplies could have been procured on the personal credit of the master, and in this more especially as he was the owner. We do not say that the mere fact of the master being owner, of itself excludes the possibility of a case of necessity that would justify an implied hypothecation; but it is undoubtedly a circumstance that should be attended to in ascertaining whether any such necessity existed in the particular case. *The Sophie*, 1 Wm. Robinson, 309. It must appear that the supplies could only be procured on the credit of the vessel."

The same position is reiterated by Justice Nelson, who wrote the opinion in one of the above cases and approved the other, in *The James Guy*, 5 Blatchford, 496, where it is decided, "to sustain a libel *in rem* against a vessel owned in New York for repairs done upon her at Baltimore, at the instance of the master, the necessity of the repairs, and for a lien upon the vessel to enable the master to procure them, must be shown." And the court says that, "the necessity for the repairs and for the lien must depend upon the facts and circumstances of the case."

In the case of the *Neversink*, 5 Blatchford, 539, the court again declares that in the cases of *Thomas vs. Osborn*, 19 Howard, 22, and *Pratt vs. Reed*, the rule which requires evidence of an apparent necessity existing at the time for supplying on the credit of a vessel, supplies furnished to her in a foreign port in order to create a lien upon her in favor of a material-man, was not extended beyond its ancient strictness as to the degree of proof required. And in that case it is decided that where the master of a steamer has no funds to pay for coal, and her charterers who owned her *pro hac vice* resided in a foreign jurisdiction, and the coal was a necessary supply, and it was obtained by the master, and credit was in fact given to the vessel and her charterers; it was held that a lien was given on the vessel.

It was also held that when the material-man resided at the home port of the vessel, and furnished coal at a foreign port, through an agent there, the supplies were considered as furnished by the agent at the foreign port, the same as if the principal resided there.

It evidently is the duty of material-men furnishing supplies at foreign ports to vessels, at the instance of the master, who is agent of the owner, to ascertain the necessity of the supplies and also of the inability of the master or owners of the vessel to pay for them, before the vessel can be subjected to a maritime lien. Such, also, is the duty of material-men in dealing directly with the owners of a vessel, as in this case. It does not appear that libellants required direct hypothecation of

the vessel, or that such was agreed upon or promised by the owner. Nor does it appear that the libellants made inquiry into incumbrances on the vessel, or questioned the pecuniary ability of the owner. The supplies were furnished at the instance and on the credit of the owner, without the aid of any facts upon which a presumption can arise of a legal hypothecation of the vessel.

In the case of the steamer *St. Lawrence*, 1 Black, 522, the evidence showed that the supplies being furnished, the amount and value being ascertained to the satisfaction of claimant's proctor, the owner of the vessel at the time gave his notes for the amount of the libellant's demand, under the express stipulation between him and libellants that their lien against the vessel should not be discharged or released unless the notes were paid. The notes were afterwards surrendered. It was held that the lien was not waived by the acceptance of the notes. That was an express hypothecation of the vessel. In the case in hand, the owner accepts the proposal of libellants to furnish supplies, and promised individually to pay a certain price, and again he agrees personally for additional repairs, libellants not at any time claiming a lien upon the vessel, even after notice from claimant that they might not be paid when the repairs were completed, but at a subsequent time.

It is contended that this libel should be sustained by reason of the remark of the justice in delivering the opinion in the case of *The Belfast*, 7 Wallace, 624, that "material-men who furnish materials or supplies for a vessel in a foreign port, or in a port other than in the state where the vessel belongs, have a maritime lien on the vessel as a security for the payment of the price of all such materials and supplies. They have such a lien, because, upon the principles of the maritime law, such materials and supplies are presumed to be furnished on the credit of the vessel," referring to cases anterior to those cited above. This remark of the judge in an opinion in a case involving the question of exclusive jurisdiction of the district courts on libels on contracts of affreightment, and not in any manner touching the lien of material-men for supplies, cannot

be taken to overrule the cases of *Thomas vs. Osborn* and *Pratt vs. Reed*.

The court cannot step aside from the contract between the parties, because it appears in the answer of the claimant that the vessel is incumbered by a mortgage to the amount of $10,000.

The claimant, for aught we know, may be abundantly able to pay all that libellants can or may recover, irrespective of his interest in the vessel. The fact of the mortgage is no evidence of his inability to pay this debt. Libellants should have satisfied themselves of claimant's pecuniary circumstances before furnishing the supplies and making the repairs, and if they had doubt of his ability to meet his contract, they should have required a lien upon the vessel, or notified him that the supplies would only be furnished on the credit of the vessel.

I am satisfied that libellants have no maritime lien on the vessel, and that the libel must be dismissed.

For a full discussion of liens for repairs, see 2 Parsons on Shipping and Admiralty, and authorities there cited.

Consult *The Eclipse*, 1871, and *The Selt*, 1872, to appear in subsequent volume of these Reports, and cases there cited. Also *The Lady Fraklin*, Volume 1 of this series, p. 557; *The Celestine*, *Id.* p. 1.

For a discussion of the lien of material-men under the maritime and state law, and the jurisdiction of the admiralty courts, especially since the amendment of May 6, 1872, to the 12th Rule in Admiralty, examine two recent decisions reported in the American Law Register for May, 1873. *The Steamship Circassian*, p. 291; *In re Estate of Kirkland, Chase & Co., Bankrupts*, p. 300. [*Reporter.*

CROWE vs. AIKEN.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—JANUARY, 1870.

IN EQUITY.

COPY BEFORE PUBLICATION.

1. An author or his assignees have, before publication, an exclusive right to control the use of his literary productions.

2. REPRESENTATION of a play upon the stage is not, at common law, a publication.

3. STATUTE OF VICTORIA.—The English Statute of 5 and 6 Victoria, chap. 45, sec. 20, which makes representation there a publication, cannot be so extended as to affect the exclusive proprietary rights of the author or his assignees at common law in the United States. It affects only proceedings had under the statute itself.

4. REPRESENTATION NOT DEDICATION.—The mere representation of a play does not dedicate it to the public, except so far as those who witness its performance can recollect it, nor have spectators the right to secure its reproduction by phonographic or other means independent of memory.

5. UNAUTHORIZED PERFORMANCE of a play which has been represented on the stage will not be presumed to be the result of memorizing it by a spectator, but the proof of this must be so clear as to negative any other conclusion.

6. NO RESTRICTIVE NOTICE is necessary to spectators to secure the author's rights, nor will such notice give him a right which he has not at common law.

7. The author's rights at common law have not been taken away or limited by any existing act of Congress.

This was a motion to dissolve a preliminary injunction restraining the defendant, the manager of a theater in Chicago, from producing a play, the copyright of which was owned by complainant.

The pleadings and facts in this case fully appear in the opinion of the court.

Jos. P. Clarkson, for complainant.

Ira B. Warren, for respondent.

DRUMMOND J. The bill in this case was filed to prevent the performance in Chicago of a drama called Mary Warner by the defendant, who is manager of a theatre. It is based not upon any copyright statutes, but on the principles of the common law and of equity. Mr. Tom Taylor, a subject of the queen of Great Britain, is the author of the drama. The plaintiff is the husband of an actress of distinction known to the public as Miss Kate J. Bateman. The play, written by Mr. Taylor for Miss Bateman, and the principal character to be personated by her, in pursuance of a contract between the plaintiff and Mr. Taylor made in February, 1869, at London, was not intended for publication, but for representation on the stage. After it was completed the author duly transferred in writing to the plaintiff all his right in the play and in the manuscript thereof, together with the exclusive right to its representation on the stage in the United States for five years from June 1, 1869. The manuscript was accordingly delivered to the plaintiff and the play was represented at the Haymarket theatre, in London, in June 1869. Afterward the plaintiff and his wife came to the United States, and Mary Warner has been performed at Booth's theatre in the city of New York.

The foregoing facts do not appear to be controverted. The bill alleges that the play has always been kept in manuscript; that it has never been printed by Mr. Taylor, by the plaintiff, nor by Miss Bateman, nor with the consent or acquiescence of any one of them, nor published with the consent or acquiesence of any one them, otherwise than by a representation on the stage, and that the defendant did not produce it at his theatre by means of the memory of those who had witnessed its representations on the stage, but by a copy wrongfully and surreptitiously obtained from the manuscript, or from a printed copy wrongfully and fraudulently printed. An injunction was issued by the court, and the performance of Mary Warner by

the defendant's company stopped. The defendant now appears and moves to dissolve the injunction.

The motion has been fully argued by the counsel of the defendant upon two grounds: *First*, the law of the case as settled in England and in this country; *Second*, on the facts contained in the affidavits of Robert M. De Witt and Charles J. Clarke, both of New York.

The affidavit of DeWitt states that he furnished the defendant with a copy of the play used by him; that he procured it from a person in London, on or about the 29th of July 1869, who obtained the same only from repeated representations on the stage at the Haymarket theatre; that there was no restriction or prohibition against any of the spectators using such play as they saw fit. He also states he is advised that by section 20 of 5 and 6 Victoria, chap, 45, "The first representation or performance of any dramatic piece in England is deemed equivalent to the first publication of a book."

The affidavit of Clarke states that the play of Mary Warner was in print in the city of New York as early as August, 1869; that he bought a printed copy of the play at a public newsstand in New York, where the same was publicly exposed for sale.

The copy furnished to the defendant has been exhibited in court. It is not in the usual form of a published play, but consists of printed slips fastened together in pamphlet form, with plats and stage directions as if for dramatic use only.

Various affidavits have been introduced by the plaintiff, from which it is apparent that the play of Mary Warner has never been printed with the knowledge or consent of Mr. Taylor, the plaintiff, nor Miss Bateman. It is not for sale generally in New York, and not at all in England. It is a fair inference, I think, from all that appears in the case, that the only printed copy in existence was printed by Mr. DeWitt, or under his direction, and is kept for sale at a high price to the theatrical managers. Mr. Clarke's affidavit was made on the 14th of December, and the copy referred to by him may have been, and probably was, purchased directly or indirectly of

DeWitt or through his instigation, and as he does not state when, it may have been since this bill was filed.

It would seem, in answer to the allegations of the bill, the defendant ought to show that his copy of the play came from a printed or other copy authorized by the author or his assignee or from the memory of those present when the play was performed. The manner in which the play was procured in London is rather vaguely stated. It was from repeated representations only. But was it from the memory of those who heard it performed, or from phonographic reporters? The statement is entirely consistent with the latter source of information.

The author of any literary or dramatic work is the sole proprietor of the manuscript and its contents, and of copies of the same, independently of legislation, so long as he does not publish it, or part with the right of property. This is called a common law right, and exists irrespective of copyright statutes. This right of property he can transfer, and a court of equity will protect him or his assignee, in a proper case, just as it will the owner of any other species of property. Those judges who maintained this common law right in the cases of *Miller vs. Taylor*, and in *Donaldson vs. Becket*, decided a hundred years ago, it has always been thought, had the strength of the argument on their side in the great discussion to which they gave rise. Subject to the qualification stated, it has been generally admitted in this country.

Mr. Taylor, then, was the proprietor of the drama Mary Warner when finished, and when transferred to the plaintiff the latter became the proprietor on the terms of the transfer. Has the right of property been lost?

It is conceded that it would be lost by any general publication of the play by the proprietor which could be regarded as a dedication to the public, but save this, it is difficult to fix on any rule which shall meet the case. The giving of a copy, or of several copies of a manuscript will not necessarily be a publication. The representation of a play on the stage was decided in England, before the statutes of 5 and 6 Victoria, not to be a publication.

There are cases in some of the courts of this country, which hold that the representation of a play is a qualified publication, viz: to the extent in which the memory of the auditors can retain its language, scenery, or incidents, and if it is reproduced only in that way the author of the work has no remedy. Of these cases it may perhaps be said that, in some instances, the court has not looked very rigidly into the proofs, considering the intrinsic difficulty of the subject. Indeed, as some of the affidavits in this case show, and as all experience proves, to write out a play from memory alone is well nigh impossible.

None of the cases cited by counsel have gone so far as to decide that a reporter can take down the words of an unpublished play as they are uttered by the actors, and thus make it public against the wishes of the author, while on the other hand, it has been frequently held that such action of a reporter can be prevented because not warranted by express or implied conditions. In some instances stress has been laid on the fact of representations of a play being had without restriction, and it is claimed Mary Warner was so produced in England. This, however is denied, and it is asserted, public notice was given both in London and in New York of the private property in the play. It is not easy to see, however, how a notice can have any effect upon the rights of the author or of the auditor. If the latter had the right to carry the play away in his memory, or to take it down phonographically, and in either case, to use or publish it, the notice prohibiting it could not affect or change that right.

The principal reason, probably, why courts are so much inclined to construe with great strictness the common law right of an author in a manuscript work, partially imparted to the public, is because the right is perpetual. All claims under copyright statutes are for a limited time only. This reason may have had great weight in the discussion which took place in England in the two cases already referred to, and the result of which was the adoption of the principle that the statute of 8 Anne, chap. 19, took away the common law property of an

author in a published work. But this common law right is always under the control of the legislative power, and it has been exercised in England; and even under the qualified publication of a play by represantation there can be no doubt that under the rule now established in the courts it might become public property, in the manner heretofore stated, after repeated representations.

There was some question whether the author of a play had, at common law, the sole right of representation; but so long as the play existed in manuscript, and was unpublished, and not in some way dedicated to the public, the sole right of representation or performance would seem to follow from the exclusive right of property. But the 20th section of the statute of 5 and 6 Victoria, chap. 45, put an end to this question, by declaring that the first public representation or performance of any dramatic piece should be deemed equivalent, in the construction of the act, to the first publication of any book; and I understand it has been decided in England that the public performance, even in a foreign country, of a play of which an English subject is the author, defeats his claim to a copyright under the British statutes.

It is insisted that as by this statute representation was publication, the play Mary Warner, by performance in England, was published there, and all right of property in the play was consequently lost, as well there as in the United States. This necessarily leads to the conclusion, and that is substantially the position of defendant's counsel, that there is no right of property in this country in the play, except that conferred by the statutes, and particularly that of Aug. 18, 1856.[1] I do not understand that the authorities have gone that far, and it does not follow because his claim under the statutes is gone, that everything is lost. He may still stand on his natural, inherent right as the author and creator of the play, and maintain that right until in some mode, in reason or by statute, it is dedicated to the public. It cannot be true in this country that the lecturer has no rights of property in his unpublished and

[1] 11 U. S. Statutes at Large, 138.

unprinted lecture; that the clergyman has no rights of property in his unpublished sermon—the work, it may be, in each case, of weeks of thought and labor—merely because he has repeated it to an audience. And I cannot comprehend why, because Congress has legislated about dramatic compositions, the author of a play should occupy different ground. The object of all copyright laws is to protect and regulate property in the product of the brain, not to annihilate it.

There can be no doubt of the authority of Congress to legislate on the subject of literary property, and to prescribe the terms upon which copyrights shall be granted, and when it has so legislated it may be truly said to create those rights under the law; and this is the sense of the language of the Supreme Court in the case of *Wheaton vs. Peters*, 8 Peters, 661, that Congress, instead of sanctioning an existing right, created it, because the court admits the right at common law. Neither, perhaps, can there be any doubt that Congress can declare what sort of publications of a literary or dramatic work shall constitute a dedication to the public.

It follows from what has been said that a definition of the word representation by a British statute is not operative as such in this country, and in all the cases which have arisen here recently upon the rights of authors to unpublished plays written by Englishmen, the objection that their rights in this country were destroyed in consequence of the clause already referred to in section 20 of 5 and 6 Victoria, chap. 45, seems not to have been taken either by counsel or the court.

I am of opinion that upon principle and authority the author, or his assignee, of an unpublished play, has a right of property in the manuscript and its incorporeal contents; that is, in the words, ideas, sentiments, characters, dialogue, descriptions, and their connection, independent of statutes, and that a court of equity can protect it. I am also of opinion that as the law now exists in this country, the mere representation of a play does not of itself dedicate it to the public, except, possibly, so far as those who witness its performance can recollect it, and that the spectators have not the right to secure its reproduc-

tion by phonographic or other verbatim report, independent of memory.

These being my conclusions, the only other question is whether the defendant has brought himself within the condition named; and, after what has been said, it necessarily follows that in my judgment he has not. I cannot doubt that DeWitt obtained the copy of the play of Mary Warner, which he furnished to the defendant in this case, either in whole or in part, through a short-hand reporter, or in some other unauthorized or wrongful way, and not by memory only. The case will therefore go to proofs in the regular way, and the injunction stand until the hearing.

The cases of *Millar vs. Taylor*, and *Donaldson vs. Becket*, referred to by the court, are reported in 4 Burrow, 2304, and 2 Browne's Cases in Parliament, 129.

Consult also *Woolsey vs. Judd*, 4 Duer 379; *Bartlett vs. Crittenden*, 5 McLean, 32, in which cases the common law rights of authors are elaborately argued.

Representation on the stage is not publication: *Murray vs. Elliston*, 5 Barnewall & Alderson, 657; *Keene vs. Wheatley*, 9 American Law Register (O. S.) 33; *Macklin vs. Richardson*, 2 Ambler, 694; *Roberts vs Myers*, 23 Law Reporter, 396; *Jones vs. Thorne*, 1 New York Legal Observer, 408; *Coleman vs. Walthen*, 5 Term Reports, 245: *Boucicault vs. Fox*, 5 Blatchford, 87; *Keene vs. Clarke*, 5 Robertson, 38.

As to copy obtained surreptitiously or by memorizing, see *Boucicault vs. Fox*, 5 Blatchford, 87; *Kenee vs. Kimball*, 16 Gray, 545; *Morris vs. Kelly*, 1 Jacob & Walker, 481.

For a full discussion of the right of copy before publication, representation, assignment, etc., see *Palmer vs. DeWitt*, 47 New York, 532. See also *Boucicault vs. Wood*, *ante p.* 33. [*Reporter.*

THE EMPIRE STATE.

DISTRICT COURT.—NORTHERN DISTRICT OF ILLINOIS.—JANUARY, 1870.

IN ADMIRALTY.

1. LIGHTS OF SAILING VESSEL.—A green and red light placed in the center of a schooner, forward, and separated only by a board, do not fulfill the requirements of the act of Congress of April 29, 1864.[1] The lights must be placed at the sides of the vessel.

2. LOOKOUT.—When at the time of a collision with a propeller the mate was near the wheelsman, and they were the only persons on deck, there was, properly speaking, no lookout, and the schooner was in fault.

3. But when they had seen the propeller, and recognized her as such, it being their duty to keep their course, it cannot be said that this want of a lookout in any degree contributed to the collision.

4. DUTY OF APPROACHING VESSEL.—Those on board the propeller having seen the schooner, but being uncertain as to her course, and not having clearly distinguished her lights until just before the collision, it cannot be said that they had all the information in regard to the course of the schooner which the proper lights would have furnished, and that their absence did not contribute to the collision.

5. The propeller, however, was bound to exercise the greatest care and vigilance, and, if necessary, check her speed; and also to watch the schooner with constant vigilance; if by doing this she could have avoided the collision, she is guilty of contributory negligence.

This was a libel against the propeller Empire State filed by Thomas O'Connor and others the owners of the schooner H. Spencer, for damages sustained by a collision between the schooner and the propeller which occurred about 3 o'clock on the morning of the 25th of September, 1867, near the western shore of Lake Michigan, about twenty miles from Chicago.

D. Goodwin and *A. L. Rockwell*, for libellants.

McAllister & Stiles and *Geo. B. Hibbard*, for respondents.

[1] 13 U. S. Statutes at Large, 58.

The Empire State.

DRUMMOND, J.—This case has been very fully and ably argued by the counsel of the respective parties, and abstracts of the pleadings and evidence furnished, so as to assist the court greatly in its examination.

The facts in the case are that the schooner was coming up the lake, heading nearly south. It was a clear, star-light night, with a light wind about west south-west. The propeller was proceeding down the lake, heading about north north-west. Each saw the other when they were a considerable distance apart. Those on board of the schooner saw the lights of the propeller, and those on board of the propeller saw the schooner, but, as they say, did not in the first instance observe the lights, and supposed that the schooner was on the same course with themselves, namely, proceeding down the lake. On board the schooner there were only two men on deck at the time, the wheelsman and the mate, and immediately before and about the time of the collision the mate was not in the forward part of the schooner, but was somewhere near the wheelsman, so as to be able to give occasional directions to him if necessary. Therefore, there was not on the schooner what could properly be called a lookout at the time, and in this respect there was undoubtedly a fault on the part of the schooner.

As already stated, those on board of the propeller did not, as they allege, at first see the lights of the schooner, and supposed for this reason that the schooner was proceeding down the lake. The first direction given to the wheelsman was (the schooner being seen on the propeller's starboard bow) to starboard the helm; and the schooner not opening much, after steadying her for a short time, the order was given to starboard her a little more, which was done, and she was headed accordingly; and it was not until the schooner was observed to be crossing the bows of the propeller, as they allege, that the lights of the schooner were seen. The order was then given to port the helm, and, immediately after, the collision occurred, the schooner being struck on her port side, not far from the stern, and being badly smashed up, the quarter, more or less of it, carried away, the helmsman carried away with it, and the schooner substantially disabled.

When those on board of the schooner saw the propeller, understanding it to be their duty to keep their course, they did so, until it was thought that a collision was imminent, when an order was given to luff up. The schooner did accordingly luff up to the wind, immediately preceding the collision; but inasmuch as this was done under the apparent pressure of an immediate collision, perhaps it is hardly to be adjudged as a fault against the schooner. Some of the officers and men on board of the schooner were more or less injured, or thrown into the water, and a boat was sent by the propeller to take off those on board the schooner and pick the others up, and they were taken on board the propeller. Some of the sails were taken in, but the mainsail was left standing with a view of keeping the schooner's head to the wind. The captain of the schooner requested the propeller to take the schooner in tow, which the master of the propeller declined to do, on the ground that he had not fuel enough, and that there might be a change in the weather. Shortly after the officers and crew of the schooner were taken on board of the propeller (the schooner being thus left upon the lake without any one on board), the propeller encountered the propeller Orion, bound to Chicago. The officers and crew of the schooner were placed on board of the Orion, and arrived at Chicago the next morning. A tug was procured, and they went down the lake with a view of finding the schooner. They found her ashore, the wind having increased with a pretty heavy sea, and were unable to do more than to dismantle her of what they could remove, amounting to perhaps $800 or $1,000, which they took to Chicago. The rest of the schooner was a total loss.

The first question is whether there was any fault on the part of the schooner which contributed to the collision.

As I have said, there was no proper watch or lookout on the schooner at the time, but, inasmuch as the propeller was distinctly seen and known to be a propeller, and as it was the duty of the schooner to keep her course, it does not appear that the want of a lookout contributed in any degree to the collision.

But I am of the opinion that the schooner was in fault, in not having her lights properly located, in conformity with the act of Congress of April 29, 1864, and in such a way as to furnish the kind of light contemplated by that act. Under that law it was the duty of the schooner to have on her starboard side a green light, so constructed as to show a uniform and unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw a light from right ahead to two points abaft the beam on the starboard side, and of such a character as to be visible on a dark night, with a clear atmosphere, at least a distance of two miles; and on the port side a red light, so constructed as to show also a uniform and unbroken light over an arc of the horizon of ten points of the compass, and so fixed as to throw a light from right ahead to two points abaft the beam on the port side, and to be visible on a dark night, with a clear atmosphere, a distance of two miles.

Had the schooner these lights as thus required by the act of Congress? It seems to me that she had not. The lights were, in point of fact, fixed on the pawl-bight, which is the center of the vessel, forward, and the lights were separated, the red from the green, by a board placed between them, and as I understand from the evidence, this was the only separation between the two lights. There was a lantern with a green light on one side, and a lantern with a red light on the other side of this board. These lights, thus placed on the pawl-bight amid-ships, and so that, in point of fact, the two lights were together, not being separated save in the manner described, the question is whether, within the meaning of this law, they were upon the sides of the vessel. It seems to me clear that they were not; and obviously one of the reasons why the law requires the lights to be placed, one on the starboard and one on the port side of the vessel is, that the lights may be separated, and thus greater facilities for observation be furnished to approaching vessels, so that if there should be any obstacle which for a moment might obscure the one, it might not necessarily obscure the other light; whereas, it is apparent that if these

lights are both together, the one light could be hardly darkened without at the same time affecting the other. From the testimony it seems to me clear that these lights thus placed on board of the schooner could not fufill the demand of the law, and in fact it is not certain that they did throw a light over an arc of ten points, and from right ahead to two points abaft the beam. If they did not, and could not, from their position, accomplish this object, then it is also clear, independent of all other considerations, that there were not such lights as are required by the act.

Admitting that the act does not prescribe the precise part on the side of the vessel where the light is to be located, still they must be substantially on the sides of the vessel and, as already stated, separated with a view of furnishing greater facility to observation. The safer course, as it would seem to me, would be for those managing sail vessels to place their lights as near the outside of the vessel as may be convenient, so as to meet the demands of the law.

For this reason I think the schooner had not a proper light at the time, located in the manner required by the act of Congress, and therefore was in fault.

The next question is, did this fault contribute in any degree to the collision? It is claimed on the part of the libellants, conceding the lights were not properly located, that those on the propeller saw the schooner; that before the collision they knew that their first impression was wrong; that the schooner was coming up the lake instead of going down, and therefore, that if the lights had been properly located, and they had seen them the object was accomplished by the observations which were actually made, and all the information communicated which the lights themselves would have furnished.

If this was clear, then it would be true that this fault did not necessarily contribute to the collision, and the consequences of it would not be visited upon the schooner. But, in view of the evidence, it is impossible for me to say that the absence of proper lights did not contribute, in some degree, to this collision. In other words, I cannot say that the absence of the

lights had nothing whatever to do with the result. If we take the testimony of those on board of the propeller as true, they did not, for a considerable time see any lights on the schooner, and their action was influenced by this circumstance, and the course of the propeller was affected. Therefore, it cannot be said that there would have been the same action, and that the propeller would have taken the same course, if they had seen the lights, and the court cannot say but if the lights had been properly placed they would have seen them before they actually did, and thus that there would have been a difference in the course of the propeller.

Again, I should have been much better satisfied, if the officers and crew of the schooner had not abandoned her altogether, as they did. She was loaded with lumber. There was no danger of her sinking. There was no immediate indication of rough weather, and I think some of the officers or crew might have remained in safety on board of the schooner, to give some direction to her course. But in view of the great damage done to the schooner by the collision carrying away part of her quarter, the time of night, the fact that so many were asleep and the natural feeling of alarm that would arise from the circumstance, I do not feel inclined to visit upon this desertion the consequences of a serious fault, but rather am disposed to palliate the act. Then there was fault on the part of the schooner. Was there fault on the part of the propeller which contributed in any degree to the collision? I think there was.

According to their own showing they had reason to believe that the schooner was going down the lake ahead of them. The wind was light. Not being able to distinguish by the sails the precise course of the schooner, the propeller going at the rate of nine knots an hour, would naturally, upon the hypothesis assumed by them, very soon approach the schooner. It was the duty, therefore, of those on board of the propeller to exercise the greatest possible care and vigilance, and, if necessary, to check the motion of the propeller. Nothing of this kind was done. The propeller kept on her course with unabated

speed, and the result was that when the actual fact was ascertained that the schooner was meeting the propeller instead of proceeding on the same course with her, there was not, it would seem, the opportunity or time, under the aspect of the case, as presented to those on board of the propeller, to avoid the collision, whereas if the propeller had been under proper command the collision might have been avoided, and I think it is apparent from the whole of the testimony, that there was not that degree of vigilance and care on the part of the propeller that there ought to have been under the circumstances.

The rule is, that every possible precaution and care should be taken, and the utmost skill used to avoid a sail vessel by a propeller. It seems by the evidence, that the mate of the propeller, whose watch it was on deck at the time, not being able to make out by the naked eye alone the course of the schooner, used a glass without success. Now, being ignorant, as it is conceded they were, on board of the propeller of the course of the schooner, they should not only have guarded their own vessel and had her under complete command, but should have watched with constant vigilance the schooner. If that had been done, I am satisfied that they could have ascertained in sufficient time, the course of the schooner, and thus have avoided the collision. I think, therefore, there was this fault on the part of the propeller, which contributed to the loss.

Again, I am not satisfied with the conduct of the propeller after the collision took place. Here was a schooner run down in the lake in the night, seriously damaged, some of the crew coming very near being drowned, not far off from shore, not far from Chicago. The propeller was bound down the lake, intending to stop at Milwaukee. It seems to me that the least that the propeller could have done under the circumstances was to try and save the property which had been injured—to tow the schooner into some safe harbor where the damages could be repaired. It was rather harsh treatment thus to abandon this disabled craft upon the lake, leave her to her fate, and, I think, not justified by the facts. If the pro-

peller had taken the schooner in tow and carried her to a safe haven, although it might have delayed the propeller, still the detention would have been inconsiderable, and it is clear much loss would have been avoided to the owners of the schooner. So that looking at the case on the whole, I think that both parties were in fault, and that the loss must be divided.

The only remaining question is as to the amount of damage. Some of the witnesses state that the schooner was worth $6,000. One of the owners states that he was offered $5,000 and refused it; what the terms were, whether it was cash, or whether on time he does not state. One of the witnesses states that the schooner is only worth $5,500. Another witness says that the schooner was worth $5,000 to $6,000. The schooner was a very old vessel; was built as long ago as 1847; she had been repaired from time to time, and was stated to be in very good condition, but it is manifest that in estimating her value, we must be influenced greatly by the fact of her being so old a vessel, and I have thought, on the whole, that $5,000 cash, taking the whole evidence and looking at all the circumstances which bear upon the question of value, would be a fair estimate to place upon her. Her owner says there was saved from the wreck from $800 to $1,000, and that in this salvage there was expended between $200 and $300. So that I have called the net value of the property saved $650. That would make the loss occasioned by the collision $4,350, which divided would cause to pass against the claimants a decree for $2,175, which will accordingly be rendered. Each party to pay their own costs.

Consult *The Gray Eagle*, Volume 1 of this Series, p. 476; and *ante p.* 25; also 9 Wallace, 505, in all of which cases it is held that the neglect by one vessel to show proper signal lights, does not absolve the other from obligation to observe the usual laws of navigation, or such reasonable and practicable precaution as the circumstances allow.

See opinion of Blatchford, J., in *Sears et al vs. The Steamer Scotia*, 2 Am. Law Times Rep., p. 60; *The Scotia*, 7 Blatchford, 308.

In the case of *Chamberlain et al vs. Ward et al*, 21 Howard, 548, the Supreme Court ruled (p. 567), that although a vessel which does not carry lights as prescribed by acts of Congress, is in fault, such neglect does not

discharge an approaching vessel from the obligation to adopt all reasonable and practicable precautions to prevent a collision; nor does it confer any right upon the other vessel to disregard or violate the rules of navigation, and the obligation to perform her duties to prevent collision remains unaffected by the provisions of the act.

A steamer should have constant and vigilant and experienced lookouts stationed in proper places, and actually engaged in the performance of their duties. *Ib.*

No reason is perceived why first-class steamers on the lakes should not take equal precautions with ocean steamers. *Ib.*

In the case of *Nelson et al vs. Leland et al*, 22 Howard, 55, collision on the Yazoo river between a steamer and flat boat, although the latter was in fault, it was held that the captain of the steamer, seeing the light ahead, should have stopped his boat, and it was no excuse that he mistook the light for a place of landing.

The rule of the Supreme Court is that when a steamer approaches a sailing vessel, the steamer is required to exercise the necessary precautions to avoid a collision; and if this be not done, *prima facie* the steamer is chargeable with fault. *The Steamer Oregon vs. Rocca et al*, 18 Howard, 570.

The rules of navigation are obligatory upon vessels approaching each other, from the time when necessity for precaution begins, and continue to be applicable as the vessels advance, so long as the means and opportunity to avoid the danger remain. *New York and Liverpool U. S. Steamship Co. vs. Rumball*, 21 Howard, 372.

These rules require sailing vessels, when approaching a steamer, to keep their course; and steamers, as a general rule, under such circumstances, are required to keep out of the way. *Ib.*

Nautical rules require that where a steamship and sailing vessel are approaching from opposite directions, or on intersecting lines, the steamship, from the moment the sailing vessel is seen, shall watch with the highest diligence her course and movements, so as to be able to adopt such timely measures of precaution as will necessarily prevent the two boats coming in contact. *The Carroll*, 8 Wallace, 302.

Porting the helm a point when the light of a sailing vessel is first observed, and then waiting until a collision is imminent, before doing anything further, does not satisfy the requirements of the law. *Ib.*

Fault on the part of the sailing vessel at the moment preceding collision does not absolve a steamer which has suffered herself and a sailing vessel to get in such dangerous proximity as to cause inevitable alarm and confusion, and collision as a consequence. The steamer, as having committed a far greater fault in allowing such proximity to be brought about, is chargeable with all the damages resulting from the collision. *Ib.*

Although the duty of vessels propelled by steam is to keep clear of those moved by wind, yet these latter must not, by changing their course instead of keeping on it, put themselves carelessly in the way of the former, and so

render ineffectual the movements to give the sailing vessels sufficient berth. *The Potomac*, 8 Wallace, 590. See also *The Pilot*, Volume 1 of this series, p. 159.

As to rate of speed justifiable during a fog, duties of the lookout, and duties of a steamer in meeting other vessels, see *The Northern Indiana*, 8 Blatchford, 92.

Consult, also, *The Kentucky*, 4 Blatchford 825; *The Hermann*, 4 do., 441; *The John Stuart*, 4 do., 444.

The respective rights and obligations as to keeping and changing their courses of steamers and sailing vessels approaching each other, examined, and rules stated; also regulations as to lights. *The Scotia*, 14 Wallace, 170. Rules which govern vessels sailing on intersecting lines at different rates of speed, *The Cayuga*, *Id.* 270.

As to absence of lookout being unimportant, see *The Farragut*, 10 Wallace, 334; also, *The Fannie*, 11 Wallace, 238.

The Supreme Court has lately decided that although one vessel may be sailing with other than the prescribed lights, and, by actually misleading another vessel, tend to cause a collision, yet this will not discharge another vessel if she by intelligent vigilance would have discovered or suspected from other indications that the vessel was not what her lights indicated. *The Continental*, 14 Wallace, 345. [*Reporter*.

UNITED STATES vs. SINGER.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—JANUARY, 1870.

BONDS AND TAXES OF DISTILLERS.

1. The 20th section of the act of July 20, 1868,[1] cannot be construed as authorizing the collection of a tax on spirits which have never been actually produced.

2. A distiller is not bound to return more spirits than he has produced. If his return is less than eighty per cent. of the producing capacity of the distillery, the assessor should assess him for the deficiency, but to the claim for a tax on such alleged deficiency, the fact that such deficiency does not exist is a sufficient answer.

3. The sureties on distillers' bonds, executed previous to the act of March 29, 1869, are not liable to reimburse to the United States the expenses and salaries charged against distillers in said act.

4. Sureties are not liable for the performance by their principal of duties not within the scope of the particular office, and which they cannot be supposed to have contemplated at the time they executed the bond.

This was a demurrer to pleas filed by the defendants in an action by the United States on a distiller's bond, and also a demurrer to one of the breaches alleged in the declaration.

The facts fully appear in the opinion.

J. O. Glover, U. S. District attorney, for the United States.

George A. Meech, for defendants.

DRUMMOND, J.—In this case the facts are, that Singer & Bickerdike as principals, and the other defendants as sureties, gave a bond on the 18th of January, 1869, to the United States in the penal sum of ninety-two thousand dollars, with the condition that as Singer & Bickerdike on and after that day intended to be engaged in the business of distillers, they should

[1] 15 U. S. Statutes at Large, 133.

in all respects faithfully comply with all the provisions of law in relation to the duties and business of distillers, and pay all penalties incurred or fines imposed on them for a violation of any of the said provisions.

The declaration alleges several breaches on this bond. The first is that Singer & Bickerdike made return of the amount of spirits that they had manufactured during the month of November, 1868, and that the quantity was less than eighty per cent, of the producing capacity of their distillery as estimated under the provisions of the Internal Revenue Law, and that on the 10th of February, 1869, the assessor made an assessment against them for the deficiency, viz, $26,089.60, which they have not paid.

To this breach the defendants have pleaded what is termed the third amended plea, and which declares that Singer & Bickerdike made return to the assessor of all the highwines and spirits produced at their distillery during the month of November, 1868, and that an assessment was made against them for the full amount of tax on the same, and that the amount so assessed has been paid, and that no other highwines or spirits were produced at their distillery during the month of November, 1868, than what were so returned.

To this plea there is a demurrer by the plaintiffs. The declaration also contains an additional breach or count, to the effect that one Davis, an internal revenue storekeeper, was appointed by the Secretary of the Treasury and assigned to the distillery of Singer & Bickerdike at a salary of five dollars a day from March 4 to March 25, 1869, inclusive, thereby becoming entitled to $110 as such storekeeper, and which amount has been paid by the plaintiffs, and thereupon it became the duty of Singer & Bickerdike to reimburse to the plaintiffs this amount, but to do this they have failed.

To this breach there is a demurrer by the defendants. The first question turns upon the validity of the plea, and consequently upon the true construction of the 20th section of the act of Congress of July 20, 1868. That section declares that the assessor, in order to determine whether all the spirits pro-

duced in a distillery have been returned, shall ascertain the whole quantity of materials used for the production—"and forty-five gallons of mash or beer brewed or fermented from grain, shall represent not less than one bushel of grain, and seven gallons of mash or beer brewed or fermented from molasses, shall represent not less than one gallon of molasses. If the return is less than the quantity thus ascertained, the distiller or other person shall be assessed for the deficiency, * * and the collector shall proceed to collect the same as in cases of other assessments for deficiencies." Now, it will be observed that the language of the section as referred to above seems to proceed on the basis that it has given a mode of ascertaining the quantity of spirits produced, by declaring that forty-five gallons of mash shall represent one bushel of grain, under the implication that when the number of bushels of grain is known, the quantity of spirits produced is exactly ascertained, an implication contrary to the fact, as is well understood by all practical distillers. If the section had arbitrarily declared how much spirits one bushel of grain should represent, then this part of the difficulty would be removed. The section concludes with this provision: "But in no case shall the quantity of spirits returned by the distiller, together with the quantity so assessed, be for a less quanty of spirits than eighty per centum of the producing capacity of the distillery as estimated under the provisions of this act."

This 20th section appears to have been framed for the purpose of prescribing a method of ascertaining the product of the distillery, or to impose a tax on its capacity as such, or to unite both, and thus if the distiller should in fact produce eighty per cent., then it was to be a tax on the product; and if less, on the capacity.

In order to determine which of these is the true meaning of this section, the facts of this case should not be forgotten. It has been conceded in the argument by the district attorney that, so far as is known and believed by the officers of the Government, the distillers in this case returned all the spirits they manufactured in the month of November, 1868, and that

the assessment in controversy was made upon a quantity of spirits that never existed.

In examining the act of July 20, 1868, the inquiry naturally arises—what was its object as to distilled spirits. It is entitled "An act imposing taxes on distilled spirits and tobacco, and for other purposes." The first section declares what tax shall be levied and collected on distilled spirits, and the following sections contain various provisions for ascertaining and securing the payment of the tax. The tenth section designates in what manner the true producing capacity of each distillery shall be determined, and how errors in such estimate shall be corrected. The thirteenth section imposes a daily tax upon the distiller in proportion to the capacity of his distillery for mashing and fermenting grain, etc.

The 14th, 15th, 16th, 17th, 18th and 19th sections contain various and minute directions as to the construction of buildings and machinery, and the mode of manufacture, in addition to those previously prescribed, and the main object of which appears to be to guard against dishonest practices by the distiller. Besides all this, the distiller or principal manager is to make his return three times a month, under oath, stating the quantity and kind of materials used for the production of spirits each day, and the number of wine gallons and of proof gallons of spirits produced, and he is bound to include all, because he must asseverate there was no more used or produced. After this follows the 20th section, the substance of which has been already stated, and numerous others, all of the same general purport up to the 59th, which imposes an annual special tax upon distillers in proportion, not to the capacity, but to the actual product of the distillery.

If it were the purpose of the law to assess also a tax upon the capacity alone of a distillery as representing its actual product, and in this way tax the supposed product itself, and if it be true that such a tax is something else than an assessment upon the distillery and machinery, merely because they possess a certain property or quality, then it is singular that such multifarious and complicated provisions were considered

necessary to ascertain and collect the amount. If the producing capacity of a distillery is known—as so many gallons a day—then it is a simple thing to say it shall pay fifty cents as a tax on every gallon it is capable of producing; and the complex and expensive arrangements and safeguards to prevent fraud, thrown around the manufacture of distilled spirits, could be dispensed with at once. The object of so much legislation must have been to ascertain the product, and thus compel the payment of a tax on the whole of the article manufactured. Such a tax may be said to be just, as having something on which to operate, whereas a tax on the producing capacity of a distillery, if it be not a tax on the distillery itself, is often on a mere imaginary thing. It is like the attempt to tax an income where there is none.

If we examine the language of the 20th section in connection with that part of the 19th section already referred to, this view of the law will be strengthened. The distiller must return the whole of the spirits manufactured, under oath, but in no case shall the quantity returned be less than eighty per cent. of the producing capacity of the distillery, so that literally, if the distillery has produced less than eighty per cent., which is alleged to be the fact in this case, then the distiller is required to make a false return and swear to it. This certainly cannot be the meaning of this section, because a previous part of the section, after assuming—contrary to the fact—that a test of quantity had been given, directs an assessment to be made if the quantity returned shall be less than that thus ascertained.

The only construction that can be given to this section, consistent with reason and the general scope and purpose of the law, in my opinion, is, if the return is not equal to eighty per cent. of the producing capacity of the distillery, the assessor shall assume that it ought to have been, and the distiller shall then be assessed on that basis, as a method of discovering the actual product. It could not have been intended the distiller should return what he had not produced, nor that he should pay a tax on nothing. My conclusion is

that the object of this section of the law is accomplished when the distiller has paid the proper tax on all the spirits he has manufactured. The letter of the section seems to be framed on a certain theory, but it is not possible, even for an act of Congress, to make a bushel of grain produce more spirits than nature has supplied and science and skill can extract. One bushel of grain is not always precisely like another, nor is distilling always carried on under precisely the same circumstances, nor with precisely similar machinery and appliances of manufacture. And if a distillery has run part of a month and it is accidentally destroyed by fire or otherwise, is the letter of the statute still to be followed and an assessment of eighty per cent. made and enforced for the whole month, when the product may have become impossible? And if not, why not? Such is a case in actual controversy in this court.

Admitting then it may have the effect of compelling the distiller to establish, when he has not returned eighty per cent. of the producing capacity of his distillery, that it was because the distillery did not produce it, I must hold, when that is done, it is an answer to the claim set up under this section for an alleged deficiency—the fact then being the deficiency does not exist. My attention has been called to the case of Dutcher[1] in this court as having some bearing on this case; but the point decided there was different from that which the Government seeks to establish here against the distiller. That was where a bond had been given under the act of July 13, 1866, on the removal of certain highwines from one bonded warehouse to another, and where the quantity of wines was ascertained by government inspection, when delivered at the one warehouse to the owner, and received at the other from him. The highwines were delivered to the owner on condition that he would agree to pay the tax on the difference between the number of gallons as delivered and as received, less certain allowances. In that case the Government held the highwines for the tax. It parted with them on a particular guaranty voluntarily entered into by the owner. The court held that

[1] Ante, p. 51.

he was bound by the terms of his contract, though it operated with some hardship in that instance. If it were clear that the intent of this 20th section of the act of 1868 was that the distiller should pay a tax on what his distillery did not manufacture, then, however unjust or oppressive such a provision might be, it could not be disregarded by the courts unless, indeed, on the ground that Congress could not impose such a tax, which point need not now be considered. In conclusion, on this part of the case, it must be said once more that if the position of the Government is correct, that the law intended to levy and collect a tax of fifty cents on every gallon of distilled spirits that a distillery was capable of producing, without regard to the fact that it was ever actually manufactured, it is to be regretted the meaning was not more clearly expressed. It was only necessary to determine the producing capacity of the distillery, and the beginning and end of its operations, and the thing was done. Instead of which we have a series of restrictions and impositions, and a system of inquisition and espionage upon distilling—admitted by the act to be a lawful occupation—which if extended to all other kinds of business, would make the collection of taxes odious and oppressive and indeed well nigh intolerable.

Nothing has been said, because the question was not made in the argument, of the application of this bond to an alleged omission of duty on the part of the principals at a time prior to the execution of the bond, a point perhaps by no means free from difficulty as affecting the sureties, whatever may be its bearing on the principals.

Neither has any stress been placed on what is said to be true, that the Commissioner of Internal Revenue, on being satisfied in some other cases that all the spirits manufactured were returned and the tax paid thereon, directed that the assessments should not be enforced, because the question really is whether it is a matter of discretion with the Commissioner or of right upon the part of the distiller. The demurrer to the third amended plea will therefore be overruled.

The second question arises on the demurrer of the defendants to the second breach in the declaration. The law in force at the time this bond was executed, (52 sec., act of July 20, 1868,) required that the United States should pay the internal revenue storekeeper, and in conformity therewith, Davis, the storekeeper in this case, was paid by the Government the sum of $110, being at the rate of five dollars a day while employed and assigned to the warehouse of Singer & Bickerdike, and all of which was after the execution of the bond in this case. On the 29th of March, 1869, Congress passed a joint resolution directing that certain items omitted in the enrollment of the appropriation act of March 3d, 1869, were to be added as amendments thereto, among which was this proviso: "That after the passage of this act the proprietors of all internal revenue bonded warehouses, shall reimburse to the United States the expenses and salary of all storekeepers or other officers in charge of such warehouses, and the same shall be paid into the Treasury and be accounted for like other public moneys."

It will be seen, therefore, that Singer & Bickerdike by this were required to repay to the United States what the latter had paid to Davis, and the question is—to say nothing about its effect on the principals—whether the sureties are liable by such an *ex post facto* resolution of Congress operating upon the condition of this bond, executed the 18th of January previous, in such a way as to give it validity against them.

I think they are not. It is a matter of grave doubt whether this bond stands on the same footing as an official bond; but conceding that to be so, what is the true rule on the subject?

One of the best considered cases to which the attention of the court has been directed, is that of the *Governor vs. Ridgway*, 12 Illinois, 14, where the Supreme Court of Illinois discusses and decides upon the effect of subsequent legislation on the liability of sureties to official bonds, and where this rule is stated. The sureties of an officer on his official bond are liable for the faithful performance of all duties imposed on him, whether by laws previous or subsequent to the execution of

the bond, if they properly belong to and are within the scope of the particular office, and not for those unconnected with it and which cannot be supposed to have been contemplated by the parties at the time they executed the bond.

Some such principle as this must be adopted or the contract of a surety, instead of being construed strictly, as confessedly it should be, is extended so as to include obligations that he never assumed. Can it be fairly said to have been within the contemplation of the sureties in this case, that their principals would be required to refund money which the Government by existing law, if a storekeeper was employed and assigned, was obliged to pay, and that thus they were to be held accountable for such an act done and default made after they signed the bond?

If this be so, where is the limit to the responsibility which may in this manner be cast upon a surety to an official bond? The contract of a surety is secondary. He is bound for the acts of his principal and not his own, and if it be true, that for what is fairly within the contemplation of the parties, though *ex post facto*, he is bound, yet if we go beyond that, it would seem to violate the fundamental principles of the contract of the surety.

If the rule insisted on by the Government in this case is maintainable, it is difficult to see why the sureties to this bond could not in the same manner and by equivalent legislation be made to reimburse the United States for the whole expense of collecting every dollar of tax paid on distilled spirits by their principals.

The decisions of the courts of the United States, which are collected and cited by Mr. Brightly in his "Federal Digest," 822, upon the contracts of sureties, are in conformity with the opinion here given.

The demurrer to the second breach will therefore be sustained.

See opinion of Supreme Court on writ of error, 15 Wallace, 111. [*Reporter.*

In re JOSLYN.

DISTRICT COURT.—NORTHERN DISTRICT OF ILLINOIS.—JANUARY, 1870.

PRIORITY OF DISTRESS WARRANT.

1. WARRANT IS MESNE PROCESS.—Under the statute of Illinois the levy of a distress warrant is in the nature of an attachment under *mesne* process, and is within the 14th section of the Bankrupt Act.

2. CERTIFICATE IS FINAL PROCESS.—The certificate granted by the court is in the nature of *final* process, and if issued before the commencement of proceedings in bankruptcy gives the landlord a perfected lien and priority over general creditors.

3. LEVY OF WARRANT GIVES NO PRIORITY.—Even though the landlord has levied his distress warrant, neither the common law nor the statute gives him a priority, if the petition in bankruptcy has been filed before certification by the court of the amount of rent due; but he must prove his claim with the general creditors.

In the case at bar David H. Wells, the landlord, had, previous to the filing of the petition in bankruptcy, levied a distress warrant upon the property of Joslyn & Swan, partners doing business in Chicago, and return was made to the Circuit Court of Cook county according to the Illinois practice, and a summons was issued, but the court had not certified the amount due when Joslyn & Swan filed a voluntary petition in bankruptcy in the District Court for this District. The case in the Circuit Court was by stipulation suspended until the question of the priority of the landlord's lien could be decided by the District Court, Walker claiming by virtue of the levy of his distress warrant a lien upon the property distrained. The firm was largely insolvent, and this was a petition by Walker to have the property subjected to his lien and secure payment in full.

The Illinois statute will be found in Gross' Statutes 1871, p. 412.

Jewett, Jackson & Small, for landlord.

W. R. Page, for assignee.

DRUMMOND J. Various affidavits and petitions have been filed in different cases in bankruptcy, concerning rent due by the bankrupts. They do not present in precisely the same form, nor in the same stages of progress, the acts of the landlord for the recovery of rent, so that, looking at them all together it has become the duty of the court to decide in a general way what is the effect of the bankrupt law upon the right of the landlord, in this state, to recover his rent, when due from a bankrupt to the landlord at the time the proceedings in bankruptcy are commenced.

It is necessary to consider in the first place what are the provisions of law in this state upon the subject of rent and the right of distress in the landlord therefor.

The earlier acts did not, in express terms, authorize a distress for rent, but simply recognized the existence of a right in the landlord, it being, as is well known, a common law right; and the adjudications of our courts upon these earlier statutes proceeded upon that principle, but yet treated it as an absolute right. The law provided that where there was a distress for rent it should be lawful for the landlord by himself, his agent, or attorney, to seize for rent any personal property of his tenant that might be found in the county where such tenant should reside, and in this respect it was different from the common law which confined the right of the landlord to distrain for rent to property on the premises. The later statutes have in express terms authorized the landlord to distrain for rent in arrear, and inasmuch as it was somewhat uncertain during what time the right of distress existed after the rent was due, the act of 1857 gave the right to the landlord to distrain the goods of the tenant for the period of six months after the expiration of the term for which the premises were demised. There are also some statutes which declare that the landlord shall have a lien upon certain products of the premises demised, for

example, upon the crops growing or grown upon the premises.

There is, however, one provision of our statute which becomes very material in the view which the court takes of the questions now under consideration. It declares that in all cases of distress for rent the person making such distress, where the claim does not exceed one hundred dollars, shall file with a justice of the peace, and where it exceeds one hundred dollars, with the clerk of the circuit court, a copy of the distress warrant and an inventory of the property levied upon, and thereupon the party against whom the distress warrant shall have been issued, shall be duly summoned and the amount due from him assessed and entered upon the records of the court finding the same, and then the court is to certify to the person or officer making the seizure the amount so found due, and thereupon the officer is to proceed to sell the property so distrained, and make the amount thus certified to him, and return the certificate so issued to him with an indorsement thereon of his proceedings, which return and certificate shall be filed in the proper court.

Under this statute it has been held that the only province of the court is to ascertain whether there is the relation of landlord and tenant, and what is the amount due.

The question is, how does the bankrupt law affect the right or lien of the landlord to distrain for rent. In other words, has the landlord the right under the law to distrain for rent, notwithstanding the filing of the petition in bankruptcy, and, can he, although there may be a distress warrant out at the time of the filing of such petition, proceed to obtain a certificate from the proper court and sell the property, notwithstanding a petition may have been filed in bankruptcy between the date of the levy of the distress warrant and the time when the certificate to sell is granted by the court?

The only provision upon the subject of rent in the bankrupt law is contained in the 19th section, which is: "Where the bankrupt is liable to pay rent, or other debt falling due at fixed and stated periods, the creditor may prove for a propor-

tionate part thereof, up to the time of the bankruptcy, as if the same grew due from day to day, and not at such fixed and stated periods."

Under the English law, it is well known, the proceeding in bankruptcy did not interfere with the right of the landlord to distrain for rent, provided the property remained on the demised premises. Undoubtedly the right may vary in different states under the bankrupt law, because the right of the landlord is different in different states. In some the right to distrain is entirely taken away, thus placing the landlord upon the same footing as other creditors, and giving him no priority. In some the right to distrain still exists, as in our own state, modified more or less by statute.

Under the bankrupt law of 1841 the right of the landlord to distrain, in those states where such right existed, was not lost. Under the second section of that law, "all liens valid by the laws of the states respectively, and not inconsistent with the provisions" of that law, were preserved; and in *Peck vs. Jenness*, 7 Howard, 612, it was decided that an attachment on *mesne* process, levied upon property, and valid by the law of the state where it was issued, was one of the liens preserved by the second section of the law, notwithstanding the property might be held simply upon *mesne* process.

The twentieth section of the bankrupt law of 1867 declares that "when a creditor has a mortgage or pledge of real or personal property of the bankrupt, or a lien thereon for securing the payment of a debt owing to him from the bankrupt, he shall be admitted as a creditor only for the balance of the debt."

The question is whether the lien of a landlord for rent is such a security as binds the property as against the assignee of the bankrupt and against the rights of the other creditors.

To prevent some of the difficulties which sprung up under the administration of the law of 1841, the fourteenth section of the bankrupt law of 1867 declares that the assignment in bankruptcy shall relate back to the commencement of the proceedings, (the filing of the petition,) and by operation of law

thereupon the title to all such property and estate, both real and personal, shall vest in the assignee, notwithstanding the same is then attached on *mesne* process as the property of the debtor, and it shall dissolve any such attachment made within four months next preceding the commencement of the proceedings. Another clause of this same section declares, "that no mortgage of any vessel or of any other goods or chattels, made as security for any debt or debts, in good faith, and for present considerations, and otherwise valid, and duly recorded pursuant to any statute of the United States or of any state," should be invalidated or affected. It is a little singular that while the bankrupt law of 1867 makes this declaration as to the effect of *mesne* process and of certain other securities upon property, it is silent as to the effect of the law upon final process; and the inference has been that while it cut off those attachments levied on property under *mesne* process, it did not necessarily interfere with the right of a particular creditor upon final process; and therefore, where under the law of a state, a *fi. fa.* issued on a judgment was a lien on the property from the time of its delivery to the sheriff, such lien would be good, provided the judgment was obtained and execution issued in good faith and not in fraud of the bankrupt law. The latest case decided by the Supreme Court of Illinois, to which the attention of the court has been directed, is that of *O'Hara vs. Jones*, reported in 46th Illinois, 288. In that case the court refers to the decisions which had been previously made by that court to the effect that under the law the landlord had a lien and a right to distrain in all cases where the rent was certain, whether the right was reserved in the lease or not. The point decided in that case was, that the landlord had a right to distrain for rent upon the property of the tenant even after he had made a general assignment for the benefit of creditors, of all his property, real and personal, on the ground that the assignee of the tenant could not hold the goods free from the lien of the landlord; that the assignee took the goods of the assignor as a volunteer and subject to all the liens to which they were then liable.

The court stated in that case that the lien in favor of the landlord was superior to other general liens, and might be enforced against all but prior liens and *bona fide* purchasers without notice, and adds: "And if the goods of the tenant are seized under execution or attachment, the landlord's lien for his rent is superior and will hold the property."

Great stress has been laid upon this sentence, and it is claimed that under the construction which has been given to the law of the state by its Supreme Court, the assignee has no right to the goods of the tenant in bankruptcy, upon which the landlord has a lien. It may be conceded that under the law of the state as construed by the Supreme Court, the lien of the landlord might be enforced against all but prior liens and *bona fide* purchasers; but, when it is said that the landlord's lien for rent is superior to that of a creditor holding the property under execution or attachment, such general language needs qualification in order to be regarded as strictly correct, and it must be understood as meaning that the landlord's lien would hold the property, provided it was not seized or held under a paramount lien; for if it is meant that the landlord would have a right to distrain goods held by virtue of an execution in the hands of the sheriff when the distress warrant issued, then it certainly is not law, because that point was expressly ruled after full argument and great consideration by the court, in the case of *Rogers vs. Dickey*, 1 Gilman, 636. There the distress warrant was levied on the first day of May, 1842, on the property of a tenant found on the premises for rent due on the 18th day of March previously; and the court held that an execution delivered to the sheriff on the 8th day of March, against the tenant, bound the property, notwithstanding the levy was not made until the 26th day of May, after the distress warrant was levied upon the property. In that case the court held that the execution creditor had a prior lien upon the property, because the execution was in the hands of the sheriff before the distress warrant was levied.

It is claimed, and with apparent reason, that a distress for rent is not an attachment upon *mesne* process, and therefore is

not within the meaning of the clause of the fourteenth section already referred to; that it is an act of the landlord himself, enforcing his own lien, existing by operation of law, by issuing a distress warrant, and causing the levy to be made upon the property.

It is true it is not, strictly speaking, an attachment upon *mesne* process; but the question is whether it is not in the nature of an attachment upon *mesne* process, and whether the order that is given by the court in the form of a certificate after the case is heard, is not in the nature of an execution, and thus bringing the first case fairly within the general scope and spirit of the clause of the fourteenth section. The language of the state statute is that after the property is levied upon the party shall be summoned. Now the most that can be said about the effect of such a warrant is that it seizes the property for the purpose of enforcing a certain right on the part of the landlord. The party against whom it is issued must be summoned to appear before a magistrate or before the court. Although this is not *mesne* process, it is in the nature of *mesne* process, requiring this proceeding in order to bring it under the sanction and action of the court. Without this the landlord can take no further step in the cause; and in this respect it is exceedingly similar to the case of an ordinary attachment upon regular *mesne* process issuing out of a court.

It seems to me, looking at the whole scope and tenor of the bankrupt law, that when a case is in this way brought (as our law brings the distress warrant of the landlord) within the spirit of the clause already referred to, it may be fairly said that the law operates in the case, and that the property is attached upon *mesne* process.

So when the party has been summoned and brought into court, and the court ascertains whether the relation of landlord and tenant exists, and what is the amount due for rent, and the amount due is entered upon the records of the court finding the same, and thereupon the court certifies to the person or the officer the amount so found due, together with the costs of court; this certificate given by the court, is not, strictly

speaking, final process, but it is in the nature of final process, and without it the officer cannot proceed to sell the property, and, therefore, the landlord cannot realize from the property attached the amount due for rent. When the certificate has once been issued it is like a writ of *fieri facias* to the sheriff, directing him in effect to sell the property of the party. It is to be borne in mind that our law is not like the English law, where there is interference between the right of the landlord and that of the execution creditor upon the goods of the tenant. The English law, as is well known, provided that where there was this conflict between the right of the landlord and that of the execution creditor, the officer making the levy under the execution should pay the landlord one year's rent, and to that extent the landlord had a priorty over the execution creditor. We have no such law in force in our state, and, therefore, as has been already mentioned, the Supreme Court decided in the case of *Rogers vs. Dickey*, that the right of the execution creditor was superior to that of the landlord under the circumstances stated.

On the whole, then, I am of the opinion that the fair construction of the bankrupt law upon the right of the landlord, in our state, is to vest in the assignee all the property of the bankrupt tenant, upon which a distress warrant has been issued and levied prior to the granting of the certificate of the court to the officer of the amount due from the tenant, and assessed and entered of record; but that, analogous to the rule in the case of final process, where the right of the landlord has been exercised by the issuing and levy of the warrant and filing a copy thereof and of the inventory of the goods before the magistrate or in the proper court, and the obtaining of the certificate of the amount found due, that becomes in the nature of final process where it is issued, and so has a priority over the general creditor in bankruptcy.

Of course it follows from what has been said that where no distress warrant has been issued, as is the fact in some of the cases upon which the judgment of the court has been asked, prior to the filing of the petition in bankruptcy, the land-

lord can have no priority or preference over the general creditors, but that he must prove his debt like any other general creditor of the bankrupt, and consequently that all the property so held by the tenant is vested in the assignee.

The question is undoubtedly an important one, and will affect a very considerable amount of property. I have given it full consideration in view of the importance of the subject, and the effect it might have upon the rights of the landlord and of the general creditors of the bankrupt. It is to be remembered that in equity the landlord may have no just preference over many of the general creditors of the bankrupt, and in view of the general scope and spirit of the bankrupt law itself, and of the effect which it was to have upon the rights of creditors, I have thought that unless the intention of the statute was clear to allow the common law or statutory lien of the landlord to have a priority over the general creditor it ought not to be so regarded, and looking at the statutes in our state bearing upon the right of the landlord to distrain for rent, it seems to me that fairly construing the two laws together and the effect which one has upon the other, it must be said that under the bankrupt law, as operating upon the state law, the landlord, except in the particular case referred to, must be treated as being upon the same footing as the general creditors of the bankrupt, and can only have a right to come in like them, and prove his debt in the usual way.

This case was, on appeal, affirmed by Judge Davis in the Circuit Court.

Rent is a lien under the laws of Virginia, New Jersey, South Carolina and Maryland. *In re Wynne*, 4 Bankrupt Register, 5; *In re Dunham and Hawks*, 27 Legal Intelligencer, 404; *In re Trim, &c.*, 5 Bankrupt Register, 23; *Walker vs. Barton*, 3 Bankrupt Register, 63. See also *In re Appold*, 1 Bankrupt Register, 178.

But distress warrant cannot be issued after commencement of proceedings in bankruptcy. *Brock vs. Terrell*, 2 Bankrupt Register, 190.

For state practice in cases of distress, examine *Sketoe vs. Ellis*, 14 Illinois 75; *Uhl vs. Dighton*, 25 do., 154; *Alwood vs. Mansfield*, 33 do., 452.

Where the landlord has under the state law a lien for his rent, it will be sustained by the court in bankruptcy. *In re Charles H. Wynne*, 4 Bankrupt Register, 5, decided by Chase, C. J.

As to landlord's lien under the statutes of Pennsylvania, consult *In re Butler*, 6 Bankrupt Register, 501.

The Supreme Court have recently passed upon this question of landlord's lien for rent, under the statutes and laws of Louisiana, holding that the service of a writ of provisional seizure, corresponding to a warrant of distress, gives the landlord a valid first lien upon the property levied upon, and comparing the case to that of an execution as distinguishable from an original process of attachment. This case, however, arose in a state where the landlord's lien is specially favored by statute. *Marshall vs. Knox, assignee, etc.*, reported in Chicago *Legal News*, May 17, 1878. [*Reporter*.

CARY, Assignee, etc., vs. NAGEL.

District Court.—District of Wisconsin.—February Term, 1870.

In Bankruptcy.

PREMIUM NOTE.

1. The bankruptcy of an insurance company is no defense to an action upon a note given for a premium.

2. Under an amendment to the charter of a mutual insurance company, authorizing them to make insurance "for a specific rate of premium to be paid in cash in the same manner as insurance companies other than mutual insurance companies are accustomed to do," they may accept a note for the premium, and recover upon it.

3. Such a note merely extends the time for a payment which should have been made in cash, becomes a part of the capital of the company, and is recoverable as assets.

This action was to recover the amount of a note made by the defendant to the Milwaukee Insurance Company, for value received in policy No. 25502, dated May 28th, 1868, for $240 payable in sums of $60 on the first day of May annually for four years, without interest until due, and in case default shall be made in the payment of any of the instalments then the whole shall become due.

The company was incorporated and did business for several years as a mutual insurance company, issuing policies and taking back notes, such policy holders being members of the company.

By an act to amend the act to incorporate the company, approved March 17 1851, it is provided, "The company shall have power in their discretion to make any and all insurance which by law they are, or may be authorized to make, to any person or persons with whom they may agree to that effect for a specific rate of premium to be paid in cash, in the same manner as insurance companies other than mutual insurance companies are accustomed to. And in all such cases the insured shall not become members of the company, nor in any wise entitled to any share of the profits, premiums or earnings, nor in any wise liable for the losses, debts or liabilities of the said company, and all premiums received for such insurance shall be passed to the general credit of the company, and all losses growing out of said special policies shall be paid in like manner as losses under the ordinary policies of the company."

A policy was issued for four years, under this amendment to the charter of the company, upon receipt of the note in suit for the payment of the annual premium.

Mann & Cotzhausen, for assignee.

Butler & Winkler, for defendant.

MILLER J. It is contended by the defendant's counsel that the premiums should be paid in cash simultaneously with the delivery of the policy, and that the company could not accept a note payable at a future time. The object of the amendment to the charter was to vest in the company the additional power to issue policies as a stock company for a specific rate of premium to be paid in cash. Insurance under this act may be made in the same manner as other insurance companies not mutual. Policy holders stand in a different relation to the company from those under the mutual system. The insured under the amended charter are not members of the

company nor entitled to a share of the profits, premiums or earnings of the company nor subject to losses. I do not think the act requires premiums to be paid in cash simultaneously with delivery and acceptance of policies. The act authorizes the company to make insurance to any person for a specific rate of premium to be paid in cash, in the same manner as stock companies. The company was not prohibited from extending the time of payment of premiums in cash. The company could transact business in this respect as other companies and make its agreement with the insured as to the time of payment of premiums in cash. The note was a mere regulation of the time of payment for the accommodation of defendant. The premium was to be paid in cash but the time of payment was extended. There is no statute law prohibiting such extension. The policy issued to this defendant imports a settlement of the premiums to the satisfaction of the company simultaneously with its execution and delivery, and binds the company in case of loss by fire, even if the note had not been given, or if the insured should become insolvent and unable to pay the premium. It is an every day practice with stock companies to issue upon credit, policies containing exemption from liability on non-payment of the premiums. A provision in a policy duly executed, that no insurance whether original or continued should be binding until the actual payment of the premium and the written acknowledgment thereof, does not invalidate a subsequent contract by parol, to renew such insurance for a premium not paid at the time the risk attaches, but postponed to a future day.[1]

The contract between the insurer and the insured is mutual and independent, and failure of one party literally to comply on his part, does not exempt the other from liability. I am satisfied that, under the amended charter, the company had lawful authority to issue policies, upon a simultaneous payment

[1] *Trustees vs. Brooklyn Ins. Co.*, 19 New York, 305; *Insurance Company vs. Sturges*, 2 Cowen, 664; *Commercial &c. Ins. Co. vs Union &c. Ins. Co.*, 19 Howard, 318; *Furniss vs. Gilchrist*, 1 Sandford, 53; *McIntyre vs. Preston*, 5 Gilman, 48; *Hamilton vs. Lycoming Ins Co.*, 5 Barr, 339.

of the premiums in cash, or upon an extension of the time of payment by taking a note, or even without a note or security.

It is not necessary to consider the question whether the defendant is estopped from making this defense.

The note in suit is a portion of the capital of the company for the payment of losses by fire. If defendant's property covered by the policy had been damaged or destroyed by fire, the company was bound by its contract of insurance to pay the loss. And in case of distribution of assets among creditors under the bankrupt act, defendant would be entitled to his *pro rata* share. The note being accepted by the company in lieu of cash paid at the date of the policy, is recoverable as so much assets, and defendant is in no worse condition by giving the note in lieu of paying the premium.[1] Upon the same principle the insolvency of a corporation is no ground for restraining collections of subscriptions for stock.[2] And stockholders are liable on their subscription to the stock ot an insolvent company.[3] Judgment for plaintiff.

That the insolvency of the company is no defense to a premium note, has the weight of the following authority: *Lester vs. Webb*, 5 Allen, 569.

Nor does the insolvency of the company entitle the insured to the cancellation of his premium note by surrendering his policy and making a *pro rata* payment. *Hone vs. Boyd*, 1 Sandford, 481. [*Reporter*.

[1] *Clark vs. Middleton*, 19 Missouri, 53; *White vs. Haight*, 16 New York 310; *Sterling vs. Mercantile Mutual Ins. Co.*, 32 Pennsylvania State, 75; *Sands vs Hill*, 42 Barbour, 651; *Huntley vs. Beecher*, 30 Barbour, 580; *Alliance Ins. Co. vs. Swift*, 10 Cushing, 433; *Huntley vs. Merrill*, 32 Barbour 386;

[2] *Dill vs. Wabash Valley R. R. Co.*, 21 Illinois, 91.

[3] *Ogilvie vs. Knox Ins. Co.*, 22 Howard, 380.

SCHLITZ, Assignee, etc.. vs. SCHATZ.

District Court.—District of Wisconsin.—February Term, 1870.

In Bankruptcy.

EXEMPT PROPERTY.

1. An assignee cannot recover property excepted by the 14th section of the Bankrupt Law.

2. Such property the debtor may lawfully mortgage or convey, and such a preference is not in violation of the act, nor a fraud on it.

3. The fact that soon after the conveyance, and before the petition was filed against him, the debtor left the country, does not place the assignee in a better position.

This was an action by Joseph Schlitz, assignee in bankruptcy of the estate of Henry Gretz, to recover the amount received by defendant in the sale of two horses which came to his possession from the bankrupt.

The facts appear in the opinion.

Mann & Cotzhausen, for plaintiff.

George B. Goodwin, for defendant.

Miller, J.—It appeared in evidence at the trial that Gretz was a brewer, and, becoming pecuniarily embarrassed, he mortgaged to the defendant two horses as security for a debt previously contracted. And it also appears that those were the only horses Gretz owned at the date of the mortgage and thereafter until proceedings in bankruptcy were commenced against him. When Schatz received the mortgage and took possession of the horses he had reasonable cause to believe Gretz insolvent. He took possession of the horses a few days

before the petition in bankruptcy was filed against Gretz. Gretz with his family left the country immediately after giving the chattel mortgage to Schatz, and is not known to be in this state.

By section 14 of the act to establish a uniform system of bankruptcy throughout the United States, the estate real and personal of the debtor vests in the assignee by assignment, which relates back to the commencement of proceedings in bankruptcy; *provided*, that there should be excepted from the operation of the provisions of the section the several articles mentioned, and such other property not included in the foregoing exceptions as is exempted from levy and sale upon execution or other process or order of any court, by the laws of the state in which the bankrupt has his domicil at the time of the commencement of proceedings in bankruptcy, to an amount not exceeding that allowed by such state exemption laws in force in the year eighteen hundred and sixty-four.

By the law of this state in force in the year eighteen hundred and sixty-four, and since, a span of horses is exempt from levy and sale upon execution. By a span of horses is understood two horses worked together as a team, as these were. The horses mortgaged to Schatz being the only horses Gretz owned, were exempt from levy. Gretz by the mortgage appropriated this exempt property to the payment of a debt, prior to the proceedings in bankruptcy, at his domicil in this state. The said section fourteen further provides that the exception shall operate as a limitation upon the conveyance of the property of the bankrupt to his assignee, and in no case shall the excepted property pass to the assignee, or the title of the bankrupt thereto be impaired or affected by any of the provisions of the act.

If Gretz had not made the mortgage, and had remained in his domicil, the assignee in bankruptcy would not be entitled to claim the horses. The fact of abandonment of his domicil by Gretz, after the mortgage of the horses to Schatz, and Schatz's possession under the mortgage before the commencement of proceedings in bankruptcy, cannot place the assignee in any

better attitude as to this exempt property in the hands of Schatz. Gretz had a lawful right to mortgage or sell the horses, and having disposed of them, under the law of the state his creditors could not take them by legal process for debt from Schatz, neither can the assignee in bankruptcy recover of Schatz the proceeds of the sale of the horses.

The creditors of Gretz not having any right to the horses as assets, the preference given to Schatz was no violation of the bankruptcy act, nor was it a fraud on them.

The provision for exemptions under state laws may be supposed of doubtful constitutionality, for want of uniformity, but this court will not for this reason delay or embarrass proceedings in bankruptcy, preferring that the question be decided by the Supreme Court of the United States.

Judgment for defendant.

A bankrupt by a mortgage waives the exemption as against the mortgagee, but not as against the assignee. *In re Jones*, 4 Chicago Legal News, 66, [*Reporter*.

THE SKYLARK.

DISTRICT COURT.—NORTERN DISTRICT OF ILLINOIS.—FEBRUARY, 1870.

IN ADMIRALTY.

DISTRIBUTION OF SURPLUS.

1. The district court in admiralty has the right to exercise equity powers in the distribution of a surplus arising from a sale under decree to the parties entitled to such surplus, whether by federal or state law; and it is immaterial whether these parties have maritime liens.

2. The reason is, because there is a fund in court which cannot be taken out except by its order, and parties having rights in the vessel can only exercise them by coming into this court.

3. PURCHASERS UNDER CONFLICTING PROCEEDINGS.—A purchaser under execution from a state court has no rights as against a decree in this court enforcing a maritime lien.

4. EXECUTION CREDITOR.—If he became the purchaser, the amount which he bid must be applied on his debt, and the balance only can be proved as a claim in this court.

5. *It seems*, that no claim would be valid as against a mortgage duly recorded under the act of July 29, 1850, except the lien by bottomry therein excepted.

6. *Also*, that a state legislature, by declaring a claim to be a lien upon a vessel, cannot override a mortgage duly recorded according to the law of Congress.

The Skylark belonged to the Lake Michigan Transportation Company in 1868, during which season various claims against the vessel were created. On the 16th of October, John Barker sued out an attachment against her in the state court at Chicago, obtained judgment, and at the sale under execution, bought her in for about $300.

Subsequently a libel for wages of seamen was filed in this court, upon which a decree was obtained, and on the 14th of March, 1869, she was sold for $4,150, the money brought into court and all the maritime claims paid.

Barker then filed a claim to the surplus as owner of the vessel, and other parties filed claims as material men, for supplies, etc.

DRUMMOND, J. These claimants, it is conceded, have not what are termed maritime liens. Their liens are under the laws of the state—either of Illinois or of Michigan. The question of distribution came before the court at a former day, between Barker, the purchaser under the attachment, and the assignee in bankruptcy of the company — the original owner of the vessel. The question arose whether the vessel belonged to Barker or to the assignee. The court held that as between these two parties Barker was the owner, because he had purchased at a sale on a final process, issued before the commencement of the proceedings in bankruptcy, and that he had acted in good faith so far as the court could see, and, therefore, his right was paramount. The present, however, is not a controversy between two parties claiming to be owners of the vessel, but between two parties claiming a right to the surplus remaining after sale under a decree which overrides all other rights, as well claims under the state law, as under the attachment at the instance of Mr. Barker.

There can be no doubt of the right of this court exercising equity powers as a court of admiralty always exercises them in a proper case, to distribute the surplus to the parties who are entitled to it, either by federal or state law, and it is immaterial whether the parties thus claiming the surplus have maritime liens or not. It is not on that account that the court exercises this power as a court of admiralty, but because there is a fund in court which cannot be taken out of court except by its order. Parties having rights to this vessel cannot exercise them, except by coming into this court. The vessel has been sold under a paramount right, and the party who holds under the sale in admiralty, has, of course, a perfect title; therefore, they must come into this court that their rights may be adjudicated.

The point is, what are their claims upon this fund. It is

insisted that because the court held as it did, between Barker and the assignee, that it must now hold,—these parties having no maritime liens—that Barker's right is superior to theirs. It by no means follows. That was a question between two parties claiming to be owners. This is between creditors; and Barker as against this decree has no right whatever. It is also insisted that as this court decided in the case of the proceeds of the Grace Greenwood,[1] that a mortgagee holding a ship under a mortgage recorded in conformity with the act of Congress of July 29th, 1850, had a prior right as against parties who had claims declared to be liens by the state law, that therefore the court must hold that Barker has a prior right. That is a *non sequitur* for the reason already stated. The question in that case was whether claims for supplies created after the mortgage was recorded, should override the rights of the mortgagee. In the absence of any special equities in favor of those claimants, it was held that the mortgage was a superior right.

The language of the act of 1850 is, that "no bill of sale, mortgage, hypothecation or conveyance of any vessel or part of any vessel of the United States shall be valid as against any person other than the grantor or mortgagor, his heirs and devisees, and persons having actual notice thereof, unless such bill of sale, etc., be recorded in the office of the collector of the customs where such vessel is registered or enrolled: *Provided*, that the lien by bottomry on any vessel created during her voyage by a loan of money, etc., shall not lose its priority, or be in any way affected by the provisions of this act."[2] Bearing in mind the language of the Supreme Court in the Reed case,[3] which is familiar to all admiralty lawyers, it is doubtful whether any claim, except in the character mentioned in this proviso, would be valid as against a mortgage properly recorded under this act of Congress.

I wish it distinctly understood that I shall not hold, unless

[1] *Ante p.* 181.

[2] 9 U. S. Statutes at Large, 440.

[3] *Pratt vs. Reed*, 19 Howard, 359.

told so to do by the Supreme Court of the United States, that every claim which a state legislature may declare to be a lien against a vessel, shall override a mortgage properly recorded under the law of Congress. These were the reasons that produced the decision in the Grace Greenwood case, to which decision I adhere.

These parties stand, so far as their claims in equity are concerned, upon an equal footing. Barker bid in the Skylark at his own risk, obtaining no other title than the judgment, execution and sale gave him, and, as against the decree of this court, no title whatever. As a creditor, he has no superior right to these claimants. If the judgments obtained by him were for supplies, so are these claims for supplies. It is simply a question of how this fund is to be distributed, and what are the equities operating upon its distribution. I believe the sum bid for the vessel by Barker was much less than the amount of the judgment. The amount for which he obtained his title, of course, must stand as a satisfaction upon the debt, but the balance, provided it has the same equity that the claim of these other parties have, shall be treated in the same way. The claim of Mr. Stevens will be disallowed altogether. He was a stockholder in the company, and superintendent in the management of its business, and in the running of its boats. I think it would be unjust that he should have the same advantage as third parties, who furnished supplies on the faith of his contracts. I shall allow Barker to come in, and if he is on the same footing as the rest, I shall order the balance to be distributed among them *pro rata*.

Decree accordingly.

See *The John Richards*, Volume 1 of this Series, 106, and cases there cited, also *Ashbrook vs. The Golden Gate*, 5 American Law Register (O. S.), 148.

That a state law cannot impair a maritime lien, see decision of Wells, J., District of Missouri, in case last above cited.

In the case of *Marsh vs. Brig Minnie*, District of South Carolina, reported in 6 American Law Register (O. S.), 328, Magrath, J., held that a maritime lien for repairs in a case of necessity must be preferred to a mortgage duly recorded, but that the mortgagee's lien was prior to all other parties.

That seamen's lien for wages is not divested by sale of vessel on execution against owner, see *Foster vs. Steamboat Pilot*, 1 American Law Register (O. S.), 403.

A general maritime lien cannot be divested by the legislature of a state. An admiralty sale alone can judicially pass the title to a vessel, discharged of liens. *Hill & Conn vs. The Golden Gate*, 6 American Law Register (O. S.). 273.

Where a vessel was mortgaged in Maine, and afterward went to New Orleans, where she was attached by an ordinary creditor, and the mortgagee intervened and claimed the vessel under his mortgage, *held* the attachment should be set aside, the suit dismissed, and the mortgagee declared the owner.

Dobbin vs. Hewett, 19 Louisiana Annual Reports, 513.

See *The N. W. Thomas*, Volume 1 of this Series, 210, and authorities there cited. [*Reporter*.

MARSHALL vs. WILLIAMS.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—MARCH, TERM, 1870.

1. COMMISSION MERCHANT,—is liable to his principal if he sells goods contrary to instructions, or is guilty of negligence in the sale.

2. WAIVER.—The receiving without objection accounts of sales made on credit, is a waiver of a previous instruction to sell for cash, and the merchant may afterward presume that he has the right to make further sales on credit.

The defendant, George F. Williams, while acting as the agent of the plaintiffs in selling oil on commission for them sold on fifteen days credit, on the 18th of January 1867, ninety-two barrels to McCormick and Callender, who soon afterwards failed, whereupon plaintiffs brought this action to recover the value of the oil.

On the 16th of August 1866, the plaintiffs had by letter instructed the defendant in selling oil for them to sell according to the "net cash rule." Nevertheless the oil subsequently

sold by the defendant for the plaintiffs was sold not for cash, but on credit, sometimes more than fifteen days, sometimes less—and returns made accordingly.

Case tried before DRUMMOND, J. without a jury

George Willard, for plaintiffs.

S. A. Goodwin, for defendant.

DRUMMOND, J. The defendant is accountable, in the first place, if he has sold the oil contrary to the instructions of the plaintiffs, and secondly, if he has been guilty of any negligence in the sale by which they have been damnified.

The testimony introduced as to the commercial meaning of these words, "net cash rule" is not of such a character that the court can place any stress upon it; the result seems to be that the language is interpreted according to the notion of each particular merchant. Some construed it in one way, and some in another. There is no general understanding among commercial men applicable to the use of such language, therefore the court must place a legal construction upon it, which is that the oil was to be sold for cash. If the case stood upon that alone, then perhaps there would be no doubt that the plaintiffs could recover. But the subsequent transactions show that if that was the purport of the instructions, it was waived, and the business was done upon a different basis.

The credits given from time to time on sales by the defendant, were known to the plaintiffs, and if it was their intention to hold defendant up to the cash rule they should have at once notified him that such sales were contrary to their instructions and that they must sell for cash. But having accepted without objection the accounts of sale made from time to time by the defendant, and drawn for and received the balances, it must be considered that their letter of the 16th of August was modified by these subsequent recognitions of the credits given by the defendant. Accordingly the presumption is that defend-

ant had the right to sell to McCormick and Callender on fifteen days credit in the same way as he had previously sold to other parties.

This is the construction that must be placed on the conduct of the plaintiffs unless it was the understanding and contract that the defendant was selling on a guaranty of the sales made. If that was so, and the plaintiffs were warranted in believing that it was so understood by the defendant, as a matter of course the change from cash to credit would not be objected to; but I doubt whether the plaintiffs could have so understood it. These sales and reports were made from time to time at the usual commissions charged. Now can it be possible that the defendant believed he was selling on a *del credere* commission and guaranteeing every sale that he made?

I cannot so interpret the conduct of the parties. I do not know what the facts may be in the commercial world. It may be that commission merchants are so anxious to get business that they may guaranty sales if they receive the property, and have the right to sell it, taking the ordinary commissions, but I did not suppose, and certainly it cannot be inferred from the testimony in this case that such practice prevails in Chicago; and therefore I cannot infer that that construction is to be given to the plaintiffs' conduct.

The only remaining question is, did the defendant act with reasonable diligence and good faith in the sales. Some things had occurred, undoubtedly, calculated to throw suspicion upon the commercial standing of McCormick and Callender, but it cannot be claimed in this case that those circumstances were known to the defendant, or to his agent. The agent who transacted the business expressly states that so far as he knew, he believed that McCormick and Callender were in good standing, and a suspicion as to their position seems not to have been known to a large number of the merchants engaged in the same kind of business, and of course may not have been known to the defendant.

It would be hard merely because a whisper is circulated among men affecting the standing of a merchant, that another

should be held accountable for the fact, if it has been indicated to others, and not to himself. So that taking all the testimony together, I cannot say the defendant was guilty of any negligence in the sale of this property to McCormick and Callender. The weight of evidence is that their standing in the community was good at the time of this sale.

This is a hard case undoubtedly on plaintiffs, but somebody has to lose his money. It is a question whether it shall be lost by the defendant or plaintiffs. If the sale was at the owner's risk, then the owner should lose; if at the risk of the defendant, he should lose.

Plaintiffs by permission of the Court took a non-suit.

A sale by a factor contrary to the order of his principal, may be afterward affirmed by the receipt of the proceeds. *Morse vs. Smith*, Dudley (S. C.), 248.

Where a commission merchant from time to time sends an account of sales to his principal, who makes no objection and draws for the balance of account rendered, it is a ratification of the sales, and the principal cannot recover for any alleged violation of instructions as to the terms of sale. *Woodward vs. Snydam*, 11 Ohio, 360. [*Reporter*.

In re WEEKS.

DISTRICT COURT.—NORTHERN DISTRICT OF ILLINOIS.—MARCH TERM, 1870.

IN BANKRUPTCY.

LIEN OF EXECUTION.

1. An execution in the hands of the sheriff being by the laws of the state of Illinois a lien upon all the personal property of the defendant within the county, for the space of ninety days, if a petition in bankruptcy is filed during that time, the lien is transferred to the property in the hands of the assignee, and the execution must be paid in full out of the proceeds.

2. JUDGMENT BY CONFESSION.—The fact that the judgment was entered upon a warrant of attorney does not invalidate the lien if the creditor did not know of the failing circumstances of the debtor, and if it was not entered up "in contemplation of bankruptcy or insolvency."

3. A direction by the execution creditor to the sheriff "to hold the execution, but not to levy for a few days, or until further orders," does not impair the lien.

On the 25th of October, 1869, Eldridge recovered a judgment in the Superior Court of Chicago, against Charles R. Weeks, upon which an execution was on the same day duly issued and delivered to the sheriff of Cook county. The judgment was entered upon a warrant of attorney, but Eldridge did not know that Weeks was in failing circumstances, nor was there any question that the warrant was given or judgment entered "in contemplation of bankruptcy or insolvency." Weeks was at the time the owner of and in possession of a stock of goods.

On the 11th of November following, Weeks filed his petition in bankruptcy, was duly adjudged a bankrupt, and the stock of goods passed into the hands of the assignee, and was sold by him. The sheriff had made a demand of Weeks upon his execution, and, upon his promise to pay, Eldridge had directed the sheriff "to hold the execution, and not to levy for

a few days, or until further orders." No levy was ever made.

At the first meeting of creditors, December 10, Eldridge proved his debt as a secured claim, according to form No. 21, setting up his judgment and execution, and the lien thereby acquired under the law of Illinois.

Eldridge then filed a petition in the bankrupt proceedings setting up the above facts, claiming a lien under his execution, and asking to be paid in full out of the funds in the hands of the assignee.

Robert E. Jenkins, counsel for Eldridge, presented the following points and authorities:

By the judgment and execution, and placing the execution in the sheriff's hands, Eldridge acquired a lien on all the personal property of the bankrupt in the county, from the time it came into the hands of the sheriff (October 25th, 1869,), for the space of ninety days. Gross' Statutes of Illinois, p. 375, sec. 8; *Marshall vs. Cunningham*, 13 Illinois, 20; *Garner vs Willis*, Breese, 290; *Rogers vs. Dickey*, 1 Gilman, 636; *Leach vs. Pine*, 41 Illinois, 65.

The failure to levy did not impair the lien. The property passed into the court in bankruptcy, subject to it, and Eldridge certainly has the right to pursue his lien in bankruptcy. The bankrupt act gives the court in bankruptcy jurisdiction to ascertain and liquidate all liens. See 1st section of bankrupt act of March 1, 1867.

By proving up his debt within the life of his writ, his lien was transferred to the funds in the hands of the assignee.

This execution is a final process. The lien was not secured with a view to obtain a preference, but, on the contrary, was taken in good faith. See opinion of Drummond J., *In re Joslyn et al*, 3 Bankrupt Register, 118 (*ante p.* 235).

J. E. Lockwood, assignee and attorney *pro se*, presented the following:

The execution returned "not levied," is *functus officio*, and is no lien after such return. *Garner vs. Willis*, Breese 290;

Phillips vs. Dana, 3 Scammon, 551; *Watrous vs. Lathrop*, 4 Sandford, 700.

If a judgment creditor enter into an agreement to stay his execution, it becomes dormant as to other parties, and he loses any lien made by a levy under it. *Ross vs. Weber*, 26 Illinois, 221; *Storms vs. Woods*, 11 Johnson, 110; *Kellogg vs. Griffin*, 17 Johnson, 274; *Ball vs. Shell*, 21 Wendell, 222.

R. E. Jenkins, counsel for Eldridge, in reply, presented the following, upon the question raised by the assignee that Eldridge lost his lien by his direction to the sheriff "to hold the execution, but not to levy for a few days, or until further orders."

Notwithstanding this direction, this execution would still be a good lien, even as against other execution creditors. *Houston vs. Sutton*, 3 Harrington, 37; *Caldwell vs. Fifield*, 4 Zabriskie, 150; *Sterling vs. VanCleve*, 7 Halsted, 285; *James vs. Burnet*, Spencer, 635; *Doty vs. Turner*, 8 Johnson, 20; Smith's Appeal, 2 Barr, 331; *Leach* vs. *Williams*, 8 Alabama, 759.

But this is not a question as between execution creditors. Weeks could not avoid this execution were he not in bankruptcy. Neither can his assignee, for liens good against the bankrupt are good against his assignees voluntarily, or others with notice, and "against assignees in bankruptcy, who are treated as volunteers." *Fletcher vs. Morey*, 2 Story, 555; *Mitchell vs. Winslow*, 2 Story, 631; *Tolbert vs. Melton*, 9 Smedes & Marshall, 9; and cited *Payne vs. Billingham*, 10 Iowa, 360, upon the point that this execution was good between the parties, deeming the question too well settled to require further authorities.

Blodgett, J.—I think the facts in this case clearly show a valid judgment in favor of Eldridge, and against the bankrupt, and a valid lien under the execution at the time of the commencement of the proceedings in bankruptcy.

There is no evidence of fraud or preference in the obtaining of the judgment and execution, and the delay in making the

levy did not defeat the lien which the statute of Illinois gives against the goods of a defendant in execution from the time the writ comes into the hands of the sheriff.

The execution then being a valid lien on the goods of the bankrupt, must be first paid in full out of the proceeds of the goods in the hands of the assignee, as this court, in disposing of the proceeds, must respect, in the order of their priority, all liens and incumbrances on the assets from which such proceeds were derived.

It is not the purpose of the bankrupt act to defeat valid liens or even advantages which creditors have obtained by their superior vigilance or sagacity, unless there is evidence of fraud or some direct contravention of the positive prohibitions of the law.

Evidently this execution was a valid lien on the goods, as against Weeks, and his assignee, under the facts in this case, is in no better position than the bankrupt himself would have been.

The order will therefore be that the execution be paid in full by the assignee.

Consult *In re McGie. ante page* 168 and cases there cited. [*Reporter.*

UNITED STATES vs. FRANK.

District Court.—Northern District of Illinois.—April, 1870.

In Bankruptcy.

1. The 44th section of the bankrupt act construed.
2. A man who, while carrying on a retail trade, buys large quantities of goods and ships them under the pretense of needing them in his regular business, but ships them off and sells them at wholesale at a sacrifice, is guilty under the act.

This was an indictment found under the following clause of the bankrupt law:

"If any debtor," etc., "shall within three months before the commencement of proceedings in bankruptcy, under the false color and pretense of carrying on business, and dealing in the ordinary course of trade, obtain on credit from any person any goods and chattels, with intent to defraud," etc., "he shall be deemed guilty of a misdemeanor, and, upon conviction thereof in any court of the United States, shall be punished by imprisonment, with or without hard labor, for a term not exceeding three years."

The facts are stated in the charge.

J. O. Glover, U. S. District Attorney, for the United States.

Silver & Willard, for defendant.

Blodgett, J., charged the jury as follows:

Gentlemen of the jury:—To constitute the offense, the accused must—1st. Obtain goods and chattels from some person or persons, on credit, under the false pretense of carrying on business and dealing in the ordinary course of trade. 2d.

Such credit must be obtained within three months from the commencement of proceedings in bankruptcy 3d. Such goods and chattels must be obtained on credit, as aforesaid, with intent to defraud.

The obvious purpose of this statute is to prevent a person from obtaining goods on credit, with the expectation on the part of those who give the credit that they will be disposed of in the ordinary course of business, when, in fact, he intends to dispose of such goods in some extraordinary or unusual manner, or knows that he is insolvent, and that the goods would go into the hands of his assignee in bankruptcy, and be disposed of for the benefit of his creditors generally, and not in the usual course of trade. It was to prevent men from abusing their credit, and imposing, by means of it, upon others, that this act was passed to compel, as far as law will do it, the observance of good faith in commercial transactions between business men.

In this case it seems from the evidence, and may be taken as undisputed, that during the latter part of 1866, and until the 6th of January, 1868, the firm of E. Frank & Bro. was engaged in business as retail dealers in boots and shoes at Springfield in this state, and that the defendant was the active, and so far as the evidence in this case goes, would seem to have been the principal member of the firm. About the 16th of October, 1867, the defendant appears, from the evidence, to have been in this city, and to have purchased on credit of from thirty to ninety days, from the several firms named in the indictment, quite considerable bills of merchandise, mainly in the direct line of his business, and with the statement that such goods were to be used for resale in his business at Springfield, stating to some that he expected to open another store at Alton, in this state. While making these purchases he made representations as to his financial condition, showing that, if true, he was then fully worthy of the credit he asked. And the witnesses testify that these goods were obtained upon the faith they placed in these representations, and with the belief and expectation that the goods so sold him would be

retailed in due course of business at the store of said firm; that on the faith of these representations then made he continued to obtain still further bills of goods up to the 18th of December 1867, the last bill amounting to $468.91, being ordered on that day from Hardenburg & Page, of this city, and shipped to him pursuant to such order.

It also appears in proof that on the 5th of October, 1867, defendant commenced shipping the goods from his store in Springfield, by express, to St. Louis, directing them in cypher, such shipments amounting to over seventy packages. And that on the 6th of January, 1868, the defendant applied to the United States District Court for the Southern District of this state, for the benefit of the bankrupt act, rendering a meagre schedule of assets, and a much larger schedule of liabilities than he had represented at the time he had obtained the goods on credit; that Emil Frank, one of the members of the firm, could not be found, and had probably absconded about the time of the application for the benefit of the bankrupt act.

These are the main features of the case on the part of the prosecution.

There seems no dispute that the goods were obtained on credit under the pretense that the defendant was carrying on business in the ordinary way, and that these goods were to be used in the ordinary course of business—that is, for retail purposes from the store of E. Frank & Brother. The main question now is, were these pretenses false, and did defendant at the time he obtained these goods, or any of them, on credit, intend to use them in some different manner from that of his ordinary and apparent course of trade.

Usually we can only ascertain a man's intentions from his acts. Criminal intentions are not as a rule divulged except as they are to be inferred from the conduct of the parties, and developed thereby. There is no positive evidence showing the time when the idea of obtaining these goods from the firms in Chicago, for the avowed purpose of selling them at retail in his store at Springfield, and in violation of that faith, shipping them off to St. Louis and selling them at wholesale was conceived.

But from the circumstances surrounding the whole transaction, you are to infer what his probable intent and purpose was at the time he obtained the goods. In examining these circumstances you will properly note the short time that elapsed between the obtaining of the goods and the shipment of a large part of defendants stock in trade to St. Louis to be disposed of in an extraordinary manner. The fact that this process of shipment was going on at the time, part of the goods were ordered and obtained, is evident, one lot of goods having been ordered on the 17th or 18th of December, when he was daily shipping his goods away by express.

The fact that he made false and conflicting statements to his creditors, as to his financial condition when he obtained the goods (if you shall believe them false from the evidence,) is also an important circumstance tending to show fraudulent intent. You will remember that in making statements of his means, he stated to some firms that he was worth $18,000, over and above all debts, and to others that he was worth $20,000, and did not owe a cent, and to others that he was worth $15,000, over all his debts; and that these creditors were put off by false pretexts when they personally visited him to investigate his affairs. Any subterfuges or acts resorted to, to keep creditors quiet while this process of depleting his stock was going on, are circumstanses which you can consider, and from which, if cogent enough in your minds, you may infer an intent to defraud, reaching back to the time when the goods were obtained.

But you must at the same time be careful not to presume criminal intent, or an intent to defraud, without evidence. The law presumes every one innocent until proven guilty, and it is your duty in examining the conduct of the defendant in these transactions to give him the benefit of every reasonable doubt, and to construe circumstances in his favor rather than against him, if susceptible of two constructions.

The law makes you the especial judges of the weight of evidence, and the question of intent is a question of fact to be settled by you under the proofs. But while you are bound to

give the defendant the benefit of every reasonable doubt, it must be a *reasonable doubt*, a doubt engendered by the insufficiency of the evidence for the prosecution to establish in your minds a belief of guilt. In other words you must deem it unreasonable to believe him guilty under all the proofs in the case. If, then, the evidence satisfies you that the defendant obtained any portion of these goods on credit, under the false pretense of carrying on business, when in truth he was not at the time carrying on business in due course of trade, but was then secretly shipping and selling them at a sacrifice at less than cost, and that said purchase was so made with intent to defraud, you will find the defendant guilty. But if the evidence does not establish these facts of false pretense of carying on business and intent to defraud, you will find the defendant not guilty.

And I take occasion to say that if the proof is deemed by you sufficient to establish the facts which I have told you must combine to make out the offense, I hope you will not hesitate to say so by your verdict. The interests of the community reqnire that offenses of this character shall, when duly proven be condignly punished, and no feeling of sympathy for the individual should prevent the due visitation of the penalties of the law upon those who are proven guilty. You owe it to every business man, to yourselves, and the community, to punish offences of this character, which if suffered to go unpunished, would destroy the confidence of all men in the efficacy and majesty of the law, and to see to it that when a case is fully made out, punishment shall follow the offense. Men should be taught that it is as dangerous to commit crime, under the guise of commercial transactions as with the false key of the burglar, or the slung-shot of the midnight marauder.

If you shall, therefore, find that the prosecution has made out their case, you will simply find the defendant guilty. It will be for the court to fix the term of imprisonment, and whether it shall be at hard labor or without it.

The defendant was found guilty.

See *United States vs. Geary*, 4 Bankrupt Register, 175. [*Reporter.*

RIGGS vs. COLLINS.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—APRIL, 1870.

RECITALS IN DECREE.

1. The recital in a decree of foreclosure that a defendant had been duly served with process is, after the lapse of time, conclusive, unless there is something in the record itself showing that such recital is not or could not be true.

2. Proof outside of the record is not admissible to contradict it, where that proof would affect the rights of third persons acquired under the decree of the court.

Ejectment for Section 26, T. 34, N. Range, 7, East, in the county of Grundy, State of Illinois.

The suit was commenced March 13, 1867. By agreement of parties a jury was waived, and the law and facts were submitted to the court.

The facts are fully stated in the opinion of the court.

Dent & Black, for plaintiff.

The adverse title asserted by the defendants has no force or credit because it is hostile to the decree of foreclosure, to which Josiah S. Breese, through whom they claim, was a party, and by which he and they are bound.

On this point, see *Grignon, Lessee, vs. Astor*, 2 Howard, 319, 340, 341; *Sargeant vs. The State Bank of Indiana*, 12 Howard, 371.

The deed of Russell to Breese was void as to the United States, because it was not recorded in La Salle county, where the land lay, when Russell's mortgage to the United States was recorded there, and because of not having been recorded in Grundy county until June 17, 1861, twenty-four years after its execution; and when the mortgage was recorded in La

Salle county, the deed not being recorded the mortgage acquired a priority under the statutes of the state.

The Act of Jan. 13, 1833, Sections 2 and 5, pp. 488–9 of Purple's Real Estate Statutes, provides thus: Section 2 required that after the first day of June, then next, all deeds and title papers should be recorded in the county where the lands were situated.

Section 5 enacted that from and after the first day of August then next, all such deeds and title papers should take effect, and be in force from and after the filing the same for record, and not before, as to all creditors and subsequent purchasers without notice; and further, that all such deeds and title papers should be adjudged void as to all such creditors and subsequent purchasers without notice, until the same should be filed for record *in the county where the land should lie.*

The statutes are now substantially the same, but the revision of the laws in 1845 changed the phraseology slightly, and reference is therefore made to the statute as it stood when the rights of the United States were acquired.

The United States in taking a mortgage became entitled to be regarded as a purchaser, and could claim the protection of the statute; for a mortgagee is a purchaser within the statute of frauds. 2 Lead. Cas. in Equity, Vol. 2, p. 53, notes to *Basset vs. Nosworthy; Lancaster vs. Dolan*, 1 Rawle, 245; *Chapman vs Emery*, Cowper, 260.

The United States having then no notice in fact or constructively of Breese having given a prior deed for this land, were within the letter and spirit of the statute entitled to have such prior deed adjudged to be void, and could and did obtain a priority over it by having the mortgage recorded in La Salle county, as was done on the 11th of May, 1838. In that situation of affairs, the United States could, after condition broken, have sustained ejectment against Breese, the grantee in such void deed, if he had entered into possession; and the right to maintain the action would not have been in any way dependent on the foreclosure of the mortgage. *Carroll vs. Ballance*, 26 Illinois, 15.

It is not correct to say that Breese was a necessary party to a suit for the foreclosure of the mortgage. *Frye vs. Bank of Illinois*, 11 Illinois, 367; *Eagle Fire Co. vs. Lent*, 6 Paige, 635.

The recording in Cook and Will counties of the deed from Russell to Breese cannot be held as constructive or actual notice to Corcoran, the purchaser from the United States. He was not required to examine the records of any county, save that in which he was about to buy. The statute does not extend the effect of the record of a deed in one or more counties so as to make it notice in regard to land situated in another county than that in which such registry is made. *Harper vs. Tapley*, 35 Mississippi, (6 George,) 506; *Taylor vs. McDonald's Heirs*, 2 Bibb, 420.

Corcoran had a right to repose on the decree of foreclosnre, and he was not bound to look beyond that. *Buckmaster vs. Carlin*, 3 Scammon, 104, 107, 108; *Voorhees vs. Bank U. S.*, 10 Peters, 477.

A purchaser had a right to presume that the title of the United States was complete; and the law would not permit him to be disturbed without clear and sufficient proof of fraud on his part. Story's Equity Jurisprudence, Section 404; *Wheaton vs. Dyer*, 15 Connecticut, 311. And in such cases the fraud must be very clearly proved. *Norcross vs. Widgery*, 2 Massachusetts, 509.

The effect, then, of the deed to Corcoran being recorded before that from Russell to Breese, was to give Mr. Corcoran a good and indefeasible estate as against Breese.

Flynt vs. Arnold, 2 Metcalf, 623; *Dunlap vs. Wilson*, 32 Illinois, 517 to 523.

There can be no doubt that Corcoran acquired all the rights of the United States as to this land, even more effectually and potentially in form than if the whole mortgage had been assigned to him.

1 Washburn on Real Property, 520; *Wyman vs. Hooper*, 2 Gray, 141-146; *Givan vs. Doe*, 7 Blackford, 210; *Tallman vs. Ely*, 6 Wisconsin, 244.

An attempt to avoid a mortgage by offering money as an answer to an action of ejectment is a novelty so discordant from authority that it can receive no judicial favor. After condition broken, the mortgagor's rights are purely equitable, and he can obtain relief only in equity.

Parsons vs. Welles, 17 Massachusetts, 419; *Hill vs. Payson*, 3 Massachusetts, 559; *King vs. The State Mut. Fire Ins. Co.*, 7 Cushing, 1; *Carroll vs. Ballance*, 26 Illinois, 15.

B. C. Cook and *Samuel W. Fuller*, for defendants.—Breese being the owner and holder of the equity of redemption in the mortgaged premises, no effectual foreclosure of the mortgage could be made without his being made a party defendant to the foreclosure, and subjected to its jurisdiction. *Reed vs. Marble*, 10 Paige, 409; *Watson & Polhemus vs. Spence*, 20 Wendell, 260; *Fuller vs. Van Geesen*, 4 Hill, 171; *Ohling et al. vs. Luitjens*, 32 Illinois, 30.

It does not appear from the transcript of the proceedings in the foreclosure suit, certainly not expressly nor by fair legal intendment or construction, that Breese was served with process or otherwise brought into court in that suit; but taking the record itself, and Paine's testimony, it affirmatively appears that he was not, and could not have been served with process, nor did he enter his appearance. The summons shows explicitly that it was not served upon Breese. The record taken as a whole shows that but one summons was issued From outside proof it is shown that service could not have been made upon him, and hence the recital of the court that "the defendants had been served with process" should be construed as including only those defendants who appear to have been served by the officer's return. If the summons was not preserved in the record with the return of the officer, showing who were and who were not served, then the recital of service in the decree would be *prima facie* evidence that all the defendants were served. *Comstock vs. Crawford*, 3 Wallace, 403; *Secrist vs. Green*, 3 Wallace, 744; *Sibley vs. Waffle*, 16 New York, 180; *Tunis vs. Withrow*, 10 Iowa, 308; *Harris*

vs. Hardeman et al, 14 Howard, 334; *Lessee of Walden vs. Craig's Heirs, et al*, 14 Peters, 147; *Bodurtha et al vs. Goodrich*, 3 Gray, 508; *Bloom et al vs. Burdick*, 1 Hill, 130; *Clark vs. Thompson*, 47 Illinois, 25; *Pardon vs. Dwire, et al*, 23 Illinois, 572.

The general rule is, that in suits upon judgments rendered in other states, the officer's return of service, or the recital of an appearance by the defendant, may be contradicted by the defendant. *Carleton vs. Bickford*, 13 Gray, 591; *D'Arcy vs. Ketchum et al*, 11 Howard, 165; *Bimeler vs. Dawson et al*, 4 Scammon, 536; *Welch et al vs. Sykes*, 3 Gilman, 197; *Elliot et al vs. Peirsol et al*, 1 Peters, 340; *Goudy et al vs. Hall*, 30 Illinois, 116; *Ferguson vs. Mahon*, 11 Adolphus & Ellis, 179; *Bonaker vs. Evans*, 16 Queen's Bench, 163; *Capel vs. Child*, 2 Crompton & Jervis, 558. The rule is not even restricted or qualified by anything decided in *Thompson vs. Tolmie*, 2 Peters, 168.

The United States was a mortgagee, and if the equity of redemption was not foreclosed by bringing Breese the owner and holder of it, into court, they had no other title, and the deed made by the Solicitor of the Treasury to Corcoran, not being accompanied by an assignment of the whole or any part of the mortgage debt, passed to him no title or estate in the mortgaged premises. It is important to consider that the mortgage debt was a single sum, evidenced by a single bond, although payable in three annual installments. So that this is not the case of an ejectment brought by the assignee of a part or the whole of the mortgage debt, but that of a deed, made by the mortgagee to a stranger, of a part of the mortgaged premises, without an assignment of the debt, or any part of it. This rule is settled in *Hutchins vs. King*, 1 Wallace, 58; 2 Washburn on Real Property, 114–5, edition of 1868; *Peters vs. Jamestown Bridge*, 5 California, 334; *Nagle vs. Macy*, 9 California, 426; *Willis et al vs. Vallette*, 4 Metcalf Ky., 195–6. *Laduc vs. The Detroit & Milwaukee R. R. Co.*, 13 Michigan, 395. "The mortgagor is now regarded as the real owner of the land, for all beneficial purposes, subject to

the charge of the re-payment of the money." *Fitch et al vs. Pinckard et al*, 4 Scammon, 83. The Supreme Court of Illinois has shown a determined purpose to uphold all the rights of mortgagees, and the assignees of mortgage debts, so far as necessary to protect the security, and while the precise question now under discussion has not been decided in that state, yet the opinions of the court in *Moore vs. Titman*, 44 Illinois 367, and *Griffin et al vs. The M. Co. of Chicago, et al*, 52 Illinois, 130, stop far short of holding that the transfer of a mortgage, without an assignment of the mortgage debt will pass the legal title to the mortgaged premises. The point is, that Breese became the owner of the equity of redemption in the La Salle county lands, as against the United States, which was not foreclosed; and the deed from the United States passed no title to the lands in controversy to the grantee, under whom the plaintiff claims.

DRUMMOND, J.—This land was purchased of the United States, by J. B. F. Russell, in 1836, and although the patent was not issued until 1839, yet, under our law, between the date of the purchase and the issuing of the patent, he is treated as the owner of the land, as against all persons except the United States. On the 13th of May, 1837, Russell, being thus the owner of the land in controversy by purchase, conveyed it to Josiah S. Breese, but the deed was not recorded in the county of La Salle, where the land was then located, and was not, in point of fact, recorded in the county were the land was situate, until the 7th of June, 1861, when it was recorded in the county of Grundy, where the land then was. On the 21st of December, 1837, J. B. F. Russell made a mortgage of the land in controversy, including various other tracts, to Henry P. Gilpin, the Solicitor of the Treasury, in trust for the United States, and in May, 1838, this mortgage was duly recorded in the county of La Salle, where the land was then located. Although Russell had previously conveyed the land to Breese, as that conveyance was not recorded in the recorder's office of the proper county at the time the mortgage was made to the

United States, and as there is no evidence tending to show that the United States then had any notice of the existence of this prior deed to Breese, the mortgage conveyed a good title to the United States, as mortgagee of the land, under our registry laws.

The amount for which this land and the other tracts were mortgaged to the United States was more than $50,000. On the 1st day of September, 1840, a bill was filed in the Circuit Court of the United States for the District of Illinois, by the United States, to foreclose the mortgage. Various persons besides Russell were made parties defendant to the bill, the averment being that Breese and others, naming them, had "some interest in the premises, as judgment creditors, or otherwise." "The premises," as I have already stated, included several tracts of land, and this section 26 among others. A subpœna, or, as our local law terms it, a summons, was issued upon the filing of this bill, on the 1st day of September, 1840, and made returnable on the 1st Monday of the December term of that year. It included, as defendants, Breese and others. The return upon the summons states that it was served upon several of the defendants—less than all—and the return concludes by stating the others were not found within the district; and among those not found was Breese, the party to whom Russell had conveyed the land in controversy, in 1837. Although there is no evidence that the Government had any notice of the existence of this prior deed at the time that the mortgage was made and delivered, it is clear that when the bill was filed it had some knowledge of the claim of Breese. True, the allegation in the bill is of the most general character, and does not distinctly set forth what the interest was, or in what tract of land among all those named in the mortgage. But still, the attention of the Government was called to the fact that Breese had some interest in the land, and therefore it might be said that there was a claim stated which it would be incumbent on any party subsequently acquiring a right, to trace up and ascertain its character.

In the bill of costs taxed in the case, it seems that there are

costs taxed only for one writ. Some evidence was introduced, which was received, subject to objection, to the effect that Breese was not, at the time the summons was issued and returned, an inhabitant of the state of Illinois, but that he had, prior to that time, removed elsewhere. This is all there is in relation to this matter, up to the time when the decree of foreclosure was rendered in June, 1841. At that time the title of the suit was entered on the record, including the names of all the defendants, and that of Breese among others. The decree declared that the defendants had been duly served with process. The precise language in which the entry is made is as follows: "This day came the said plaintiffs, by their solicitor, and the said defendants having been duly served with process; and having failed to appear, as by the within writ they were commanded, and having failed to answer the complainants' said bill of complaint, herein filed, although more than three calendar months have elapsed and passed by since the return of the writ aforesaid, upon them executed." And then follows the decree. The court directed a reference to a master, under which a report was made, and then an order of sale of the mortgaged premises, at which sale the section in controversy was struck off to the United States for the sum of $641. The land was sold in separate parcels. After the sale, and after a deed from the master was executed to the United States, the latter, on the 28th of December, 1847, through the Solicitor of the Treasury, who was the authorized agent of the Government for that purpose, under the act of 1830, conveyed this section of land and other tracts to W. W. Corcoran, and the deed, together with the deed from the master to the United States, was duly recorded in the county where the land was situated; the master's deed in April, 1843, and the other in July, 1848. W. W. Corcoran, in 1866, conveyed this section of land to the plaintiff, and this is the title of the plaintiff. The defendant claims title through the unrecorded deed of Josiah S. Breese.

The questions in the case appear to be: *First*, whether it will be presumed upon the face of the decree and the record,

that the averment contained in the decree, that service of process was made on Breese, is true; and if not, *Secondly*, what was the effect on the title of the United States, or of Corcoran, of the allegation in the bill that Breese had some interest in the land.

I will consider this last question first. Admitting, therefore, that Breese was not a party to the proceedings to foreclose the mortgage; that is to say, although named, he was not served with process, then he would not be bound by the decree, and his equity of redemption would be a subsisting equity, unless it has been lost by something independent of the proceedings in the foreclosure suit; then, that being so, what would be the position of the United States, or of a purchaser from the United States. I apprehend it would be this: Although at the time of the decree of foreclosure and of the filing of the bill, it may be said that the Government had knowledge of a claim of Breese to the premises; still, as already stated, when the mortgage was made, there was no notice of such a claim, and therefore it would be a valid mortgage of this land, under our registry law. Then, when the deed was made by the Solicitor of the Treasury, under the circumstances in evidence, of this tract of land, to Mr. Corcoran, it would be by a mortgagee who was the purchaser at a sale the purpose of which was to foreclose the mortgage and deprive Breese of his equity of redemption, and whether this was effectual or not, as the Government was a mortgagee, and would, as such, hold the legal title, the purchaser, under the decree, and from the mortgagee, would also be a mortgagee, and would thus represent *pro tanto* the debt which the mortgage was given to secure; and the rule which, it is claimed, sometimes prevails, that the mortgaged premises cannot be transferred or conveyed irrespective of the debt which the mortgage was given to secure, would hardly apply. It would have to be treated, I think, substantially as though it were a transfer *quoad hoc* of the debt which the mortgage was given to secure, and therefore the purchaser from the United States would also be the mortgagee, and would have the legal title to

the land, as the United States had, and so, default having been made in the payment of the sum due on the mortgage, would have the right to maintain an action of ejectment.

As I understand, this is the effect of the decision of the Supreme Court of this state, made in the case of *Carroll vs. Ballance*, 26 Illinois, 9. But, however this may be, I am of the opinion that as the case now stands, as to the first question named, it must be considered that the equity of redemption, if that was the interest which Breese had, and was referred to in the bill, is gone under the foreclosure suit, because Breese must be regarded as one served with process.

It is thirty years, very nearly, since this decree was rendered. Breese was a party to the bill. The decree recites that service was had upon him—that is, it names all the defendants, and declares the defendants were duly served with process, and after the lapse of so much time, it seems to me that the averment in the decree must stand as true, unless there is something upon the face of the record itself which shows that such was not the fact at the time it was made. There are some decisions of the Supreme Court of our own state, perhaps, which go the length of declaring where a record recites that process was served, when it clearly appears it was not, and could not have been, that when the question comes up even collaterally, the court will not regard as conclusive the averment of the service of process. A case relied upon on the part of the defendant was that of *Goudy vs. Hall*, 30 Illinois, 109. But, although the court says in that case that the judgment recited that the process was served, when it appeared it was not, it would not be treated as binding, yet that statement was not necessary to the decision of the case, because the court held that there was nothing in the proof inconsistent with the recital in the judgment that due notice had been given. But this case, even if we admit the correctness of such decisions or dicta, is not within any principle there decided. For it is possible that another writ issued from this court, returnable to the first Monday of June, 1841. We know that the process returnable to the first Monday of December, 1840,

was not served on Breese; we do not know that another process was not issued, and served on him, and therefore he might have been duly in court on the first Monday of June, 1841. This seems to be a sound principle—that in a collateral issue, if any proof whatever, either in the case or out of it, is to be admitted, to contradict the decree, alleging due service of process, that proof must show that the averment could not be true. And this case is not brought within that rule, for it is quite possible that another summons was issued, served and returned, and that it is lost or mislaid. We must presume, in the absence of clear proof to the contrary, that the averment that Breese was duly served with process was true, and especially after the lapse of so many years. But if we assume this to be so, *prima facie*, the decision of *Rivard et al vs. Gardner*, 39 Illinois, 125, is to the effect that proof, outside of the record, is not admissible to contradict it, where that proof would affect the rights of third persons, acquired under the judgment or decree of the court. It is admitted, in that case, that there is some conflict in the authorities; but the language of the court is: "We entertain no doubt that the rule forbidding the return to be contradicted, as against third persons who have acquired rights under the judgment of the court, rests upon the sounder reason. The importance of the rule, as a question of public policy, upon which the principles of law are designed to rest, is most apparent. The public should be permitted to purchase property sold under the judgment or decree of a court, without the apprehension that at some distant day their titles may be divested by parol testimony, that the return of the officer upon which such judgment was rendered was falsely made."

It is true that the question in that case was as to the return of the officer; but if we concede the effect to be given by the recital in the decree, then the principle is precisely the same in this case.

It seems to me that the case of *Miller vs. Handy*, 40 Illinois, 448, decides a principle applicable to this case. There the question arose on a judgment on a *scire facias*, to foreclose

a mortgage. By our statute, when there is no service of the *scire facias* on the party to be affected by it, it requires what is termed two *nihils;* and in that case the judgment of the court recited that there had been due service, as prescribed by law, in order to foreclose the rights of the mortgagors. But only one writ was found in the case upon which the return of *nihil* was made, and yet the court, where the question came up collaterally, and the rights of third persons were to be affected, held that it would presume in favor of the recital in the judgment, that there was another writ, which had been properly returned. And why? Because there had intervened one or more terms between the date of the first writ and the judgment of foreclosure, when there might have been another writ issued and returned. "We are to, presume," the court says, "on the faith of the finding of the court, that such was the fact,"—that is to say, that the averment in the judgment was true—"that there was time and opportunity for it, and it is stated as a fact found by the court, that two *nihils* had been returned. Is it just or consonant with right? Is it protective of the interests of the public that the mere absence from the files of one of these writs shall rebut the presumption upon a prior finding of the court, at the very incipiency of the judgment, and that, too, after the lapse of more than twenty-five years? The necessity of such a presumption is fully discussed in the case of *Reddick vs. The State Bank*, 27 Illinois, 148. We there said: "It does not seem reasonable to require a party who has purchased land under the judgment of a court of competent jurisdiction, *bona fide*, and with no notice of any such defects as the absence of a summons or notice, to be put in jeopardy of his title, or be required to take the risk of the loss or abstraction of a loose paper from the files, when the decree or judgment of the court recites the fact that process was duly served, or the required notice duly given. These are facts lying at the very threshold of the case, and on which the court is required to be informed and to pronounce, just as much as upon any other fact in the cause. * * * We cannot perceive any reason why the

rights of parties depending upon these preliminary facts, should not be as secure, unless impeached by the record itself, as upon any other adjudicated facts in the cause, especially after the lapse of more than a quarter of a century."

Now, this reasoning applies with peculiar force to this case. Here is a party wishing to make a purchase of a tract of land. It is offered for sale by the Government of the United States, under a title resting upon a mortgage made in 1837. There is nothing whatever upon the files of the record in the proper county, where the land is situated, which affects in any way the validity of this mortgage. There is nothing which affects the sale made under the decree of foreclosure to the United States of his tract of land, except what is recited in the bill, that Breese had some interest in the land as a judgment creditor or otherwise. Breese is a party to the bill of foreclosure. The decree of foreclosure recites that process was duly served upon him. Is not that, and ought not that to be, satisfactory evidence to the party seeking to make the purchase, that he has obtained a good title under the mortgage, as against the mortgagor, and so against all parties whom the decree recites were then served with process? I think that question must be answered in the affirmative, if there is nothing in the record itself which shows that the averment in the decree could not be true. It is only in that way, as it seems to me, that we can give stability to the decrees and judgments of courts, and to titles obtained under them, especially after the lapse of so many years.

Now, in this case, it may be said that Breese obtained a good title, that it failed on the technical ground of want of record, and that, in equity, his claim is valid. That is one view of the case, undoubtedly; but there is another equally strong, and even stronger, as a matter of mere equity, growing out of the foreclosure suit, and averment of service of process upon Breese and the *bona fide* purchase by Corcoran of the title of the United States obtained under this decree of foreclosure. There can be no question of the entire good faith of Corcoran in making this purchase, of his ignorance of any claim what-

ever on the part of Breese to this land, unless upon the constructive notice which arises on this averment in the bill.

The proof shows that under this title thus obtained, taxes were paid upon this land for seventeen years, from 1848 to 1864, inclusive.

Then the equity, it seems to me, of the plaintiff's title is as strong as any supposed equity on the part of the defendant.

The issue and judgment of the court will therefore be for the plaintiff.

This case was on appeal, together with a like case argued therewith, affirmed in the Supreme Court in a short opinion simply holding that to redeem property sold under a mortgage for less than the mortgage debt, it is necessary to tender not simply the amount of the sale, but the whole mortgage debt; and that the redemption money is to be distributed between the mortgagee and the purchaser in equitable proportions, so as to reimburse the latter his purchase money, and pay the former the balance of his debt. 14 Wallace, 493.

The other questions presented by record seem to have been ruled by the Supreme Court in favor of Riggs, as appears from *Dirst vs. Morris*, 14 Wallace, 484; in the opinion in which case the fact that the Government agents, when they took the mortgage from Russel, had no notice of his unrecorded deed to Breese, was held sufficient to entitle the mortgagee or assignees to possession of the land on non-payment of the mortgage debt at maturity. [*Reporter*

WHITON, Administrator etc., vs CHICAGO & NORTH-WESTERN RAILROAD COMPANY.

Circuit Court.—Eastern District of Wisconsin.—April Term, 1870.

1. Negligence in Crossing Track.—Where three persons, having waited for a freight train to pass, at the crossing of a frequented street, then cross the track, and two of them are struck by a switch train on an adjoining track, and killed, there being at the time a strong wind blowing, the bell on the switch train not having been rung, and the survivor having neither seen nor heard the switch train until after the accident, the circumstances are not such as to warrant the court in instructing the jury in an action brought by the representative of one of the deceased persons that the plaintiff could not recover.

2. Not Excused by Speed of Train.—Although the freight train was running at a higher speed than allowed by law, and probably if it had not been passing, the accident would not have occurred, nevertheless the only effect of the passing of that train was to modify or influence the conduct of the others, and the fault of the freight train is too remote in law to constitute one of the causes of the accident.

3. This court is, however, not prepared to say that every person who, in a populous town at a railroad crossing, fails to pause and look up and down the track, is guilty of such negligence as to prevent a recovery for an injury inflicted by the flagrant wrong of those in charge of a passing train.

4. Ringing Bell.—The bell should be rung not only before crossing a street, but so long as there is danger of encountering passers-by.

5. Contributory Negligence.—The courts are much influenced by the conduct of the defendant, and, if the wrong is flagrant, are inclined to hold that to be the cause of the injury.

6. Who to Judge of Negligence.—While there are some things as to which it might be the duty of the court to charge that they constitute negligence, there are many others which the court must leave to the jury to decide. The court properly charged the jury that if the bell of the switch train was not rung, that was negligence, and left it to them to decide whether the person injured had been negligent.

7. Exclusion of Evidence.—Where, on the objection of a party, competent evidence has been excluded, he cannot urge that as error on motion for a new trial.

Whiton vs. Chicago & N. W. R. R. Co.

8. MEASURE OF DAMAGES.—Where the jury rendered a verdict for the highest sum allowed by statute, five thousand dollars, it being shown that the person killed was a superior woman—as wife, mother, and member of society— there is nothing in the amount of the verdict to authorize the court to interfere.

Motion for a new trial after a verdict by a jury for $5,000 damages for death of plaintiff's wife by alleged carelessness of the defendant.

The facts are stated in the opinion of the court.

Conger & Sloan, for plaintiff.

Pease & Ruger, for defendant.

DRUMMOND, J.—This is an action under the statute of this state brought by the plaintiff for the death of his wife, caused by the alleged wrongful act of the defendant.

Mrs. Whiton and Mrs. Woodward, in December, 1864, resided near each other on Bluff street, in Janesville, in this state. One morning near Christmas of that year, they left home and proceeded along the north side of Bluff street, until they reached Academy street. They then turned south on the west side of Academy street until they arrived at the railway crossing. At that time there were four tracks crossing Academy street, on the same level, extending north-east and south-west, the street there running about north and south. The two most north-westerly tracks belonged to the Milwaukee & Prairie du Chien Railroad, and the other two to the defendant. When they arrived at the railroad crossing, a freight train was passing the street in a north-easterly direction, on the south track of the Milwaukee & Prairie du Chien Railroad, at a rate of speed unauthorized by the law of this state. Mrs. Whiton and Mrs. Woodward therefore stopped until the freight train had passed. Standing there with them, also waiting for the freight train, was Mr. Jacob C. Rice, the sole surviving witness of what immediately occurred. It was about eleven o'clock. The morning was quite cold, with a very strong wind blowing from the south-west. There was some snow

falling at the time, and there were a few snow piles lying near the track, apparently previously thrown off the track. While the freight train was going up the track, a switch train was backing down in a south-west direction, on the south track of the defendant. The tender came first, then the engine, and next a freight car attached to the engine. Mr. Rice was standing very near the freight train as it crossed Academy street, and as soon as it passed, he instantly, with a quick step, crossed over the railroad tracks, and after having crossed the tracks a rod or so, he heard a scream, turned round and saw that Mrs. Whiton and Mrs. Woodward had been struck by the tender of the switch train. Mrs. Woodward was almost instantly killed, and Mrs. Whiton, after lingering a few weeks, died from the effects of the injury. As Mr. Rice crossed he cast his eyes at the track, and saw nothing in the way, and so passed on till he was arrested by the cries of the ladies. He did not see the switch train before, nor as he crossed, and heard no signal bell from that train.

The questions submitted to the jury were: 1st, whether Mrs. Whiton's death was caused by the negligence of those who had the management of the switch train; and 2d, was Mrs. Whiton herself guilty of any fault or negligence which contributed to that result. And the jury having found negligence in the defendant, and none in Mrs. Whiton, the question is whether there is any error of fact or law to prevent judgment on the verdict. We think there is not.

In looking through the various objections made by the defendant to the rulings of the court in receiving or rejecting testimony on the trial, we see nothing material to the issue decided erroneously against the defendant, and we think under the facts of the case it would have been error for the court to instruct the jury as requested by the defendant, that the plaintiff could not recover.

As to the negligence of the defendant, the court in substance instructed the jury that it was the duty of those having the management of the switch train to cause the bell of the engine to be rung a sufficient time before crossing Academy street to

give warning to any passengers on that street desirous of crossing, and to keep it ringing until the tender had crossed the street, and also that it was the duty of those having the management of the train to keep a proper lookout in the direction the train was moving, and particularly under the circumstances of the case—a freight train going up one of the tracks, the switch train just approaching a much frequented place, and a violent south-west wind blowing at the time.

As to the negligence of Mrs. Whiton, the court in substance instructed the jury that she was required to exercise that degree of prudence, care and caution incumbent on a person possessing ordinary reason and intelligence under the special circumstances of the case, having regard to the fact of its being a railroad crossing, and another train crossing the street, for which she had to wait in company with Mrs. Woodward, and therefore she should have used extra care, prudence and caution. The court declined to say to the jury how she must dispose of her limbs, her eyes or her ears, but left it to the jury to find whether she had been guilty of any fault which contributed to her death, and said that, if she had, the plaintiff could not recover even though the defendant had been guilty of negligence. The court also told the jury before they could find a verdict against the defendant they must be satisfied its employes were guilty of negligence, and that such negligence caused her death. As to the damages, the court instructed the jury that they could give nothing for feeling, sympathy or mental suffering, but that they were restricted to the rule of pecuniary injury alone resulting from the death of Mrs. Whiton, to the plaintiff; that it was almost impossible to lay down any fixed rule on the subject; that it largely rested in the sound reason and discretion of the jury—taking all the facts of the case into consideration—her personal qualities, her ability to be useful and to earn money.

This is the general aspect of the case. It may be proper now to advert to some special objections taken to the rulings of the court in the instructions given and refused.

There were several instructions asked which proceeded on

the assumption that the freight train, in running too fast on the Milwaukee & Prairie du Chien track, proximately caused the death of Mrs. Whiton. The instruction given on this point was that the only effect of the freight train being there under the circumstances mentioned was to modify or influence the conduct of those on the switch train, and of Mrs. Whiton, and consequently the court considered the fault of the freight train, as connected with the death of Mrs. Whiton, as too remote in law to be regarded as the cause of her death. We see no reason to change this opinion. Undoubtedly, it may be said that if the freight train had not been there Mrs. Whiton would not have been killed. So she might have escaped if Mrs. Woodward had not been with her, or if they had not followed directly after Mr. Rice.

It is insisted that if the bell of the switch train had been rung for some time before, it need not have been up to the time of crossing the street. The object of ringing the bell is to give warning. The passengers in this case were on the west side of Academy street; a freight train shut out the view of the switch train. As long as there was risk of encountering passengers, the bell should have been rung to attract their attention.

Many instructions requested by the defendant were to this effect—that it was the duty of Mrs. Whiton before attempting to cross the track to look carefully up and down to see what obstacle was in the way, and even to stop for that purpose, and if this was not done it was negligence. The court instructed the jury that Mrs. Whiton must have observed due care, caution and prudence. These imply needful and usual foresight and watchfulness. We are not prepared to say that any person who, in a populous town, at a railroad crossing, in walking on a street, shall fail to pause and look along the track, is guilty of such negligence as to prevent a recovery for injury inflicted by the flagrant wrong of those on a passing train. We have to take men and women as they are, and judge of them by their conduct under such circumstances. Suppose the reason the person does not look up or down the

track, is that the bell of the engine is not rung. And can an engine be permitted to recklessly run over passengers, because if they do not get out of the way they are in all cases guilty of contributory negligence? The very object of ringing the bell is to attract attention. It will often happen, as indeed observation proves, that persons walking over a railroad track on a public street of a town will be more or less pre-occupied, and those who control so powerful an instrument of destruction as a locomotive in motion, are required to ring the bell to make them watchful. It will be found on examination of the cases in those courts which will not permit a recovery where there has been any fault whatever on the part of the person injured, that they are very much influenced by the conduct of the other party. If the wrong is flagrant they are inclined to hold that to be the cause of the injury. A very striking illustration of this is to be seen in two cases recently decided in England in the court of Exchequer, the one following the other in the same volume of reports. In the first the railway company was thought free from fault, and the rule as to contributory negligence by the deceased was stated with some stringency; but in the second, where the railroad company was guilty of gross negligence, it was held the case was properly left to the jury, although the evidence showed the deceased, as he crossed the track, was looking down on the ground.

In fact, while there are some things about which all intelligent men agree, and as to which it might be the duty of the court to charge that they constituted negligence, yet there are many others where the court must leave it to the jury to decide whether or not negligence is established, and therefore it is by no means uncommon to find a court in the same charge to a jury, declaring that if a certain fact exists it is negligence, and if another, that it is for the jury to determine; and this must be so as long as negligence in any of its bearings is a mixed question of law and fact.

The court instructed the jury in this case if the bell of the engine of the switch train was not rung so as to give warning to Mrs. Whiton, it was negligence, and the court refused to

instruct the jury that she had been guilty of negligence, but left that to the jury to determine. We think this was correct, and we see no reason for disturbing the verdict because on either point it was not warranted by the evidence. We think the testimony indicated that the bell of the engine was not rung as it approached Academy street so as to give warning to them on that street. Neither the engineer nor the fireman saw Mrs. Whiton or Mrs. Woodward before they were struck by the tender; they therefore were not on the lookout for the street. As to the negligence of the employes of the defendant in the conduct of the switch train, there can be no doubt the finding of the jury was warranted by the evidence. Of the conduct of Mrs. Whiton at the moment we know nothing except what may be inferred from the result. No living witness, so far as we know, saw her from the instant that she moved to cross the tracks until she was struck. We do not know whether she glanced along the track, or saw the switch train, and if she did we are ignorant of the impression made on her mind—whether she thought it moving or standing, we cannot tell. She had to pass over about thirty feet, probably a little further, from the spot where she stood waiting for the freight train to cross, until she reached the track on which the switch train was moving. What was seen or heard in that brief time by Mrs. Whiton is very much matter of conjecture. The chances are that she and Mrs. Woodward followed Mr. Rice immediately, and while he, walking faster, escaped, they were killed. Now, if the bell of the engine had been ringing as they started, what would have been its effect on them? This as well as other facts connected with her conduct were left to the jury to decide.

It is also claimed by the defendant that since the trial it has been ascertained that Mrs. Whiton, while on the spot, and very soon after the accident, said she did not hear the bell, and inference is thence sought to be drawn that she did not see the switch train. The plaintiff offered to prove the declarations of Mrs. Whiton, and the defendant objected, and they at the time were excluded, subject, however, to the right on

the part of the plaintiff to have the matter reconsidered. The opinion of the court on this point was not subsequently taken, and therefore the ruling remained as made at the instance of the defendant. We think it would be something unusual to grant a new trial to a party for the reason that the court had not admitted testimony excluded at his instance. We are induced to think the declarations were competent evidence, but we do not see how their exclusion injured the defendant. If the proof had been admitted, it seems to us, to say the least, it would have operated quite as much against the defendant as otherwise.

Various instructions were requested upon the subject of damages, all of which were refused, and the jury instructed as heretofore stated. It is confessedly a most difficult matter to deal with, and from the nature of the case does not admit of any fixed rules, The statute itself, while confining the recovery to the pecuniary injury resulting from the death, does not specify in what it shall consist. The jury in this case found the highest sum allowed by the law, five thousand dollars, and though the testimony bearing on this branch of the case was quite indefinite, yet it showed clearly that Mrs Whiton was a superior woman, as wife, mother, and member of society, and there is nothing in the amount of the verdict to authorize the court to interfere on that ground.

Miller J. concurring.

This case was affirmed by the Supreme Court, 13 Wallace, 270.

Company is bound to use care and dilligence to prevent injury to persons at crossings. *Bradley vs. Boston & Maine R. R. Co.*, 2 Cushing, 539; *Macon etc. R. R. Co. vs. Davis*, 18 Georgia, 679; *Augusta etc. R. R. Co. vs. McElmurry*, 24 do. 75; *Barrett vs. Midland R. R. Co.*, 1 Foster and Finlason, 361; *Curtis vs. Central Railway*, 6 McLean, 401.

As to what constitutes negligence on the part of a passer-by at a crossing, consult *Chicago etc. R. R. Co. vs. Still*, 19 Illinois, 500; *Beisseigal vs. New York Central R. R. Co.*, 33 Barbour 429; S. C., 34 New York, 622; *Milwaukee & Chicago R. R. Co. vs. Hunter*, 11 Wisconsin, 160; *Evansville etc. R. R. Co. vs. Lowdermilk*, 15 Indiana, 120; *Ohio etc. R. R. Co. vs. Gullett*, Id. 487; *Wilds vs. Hudson River R. R. Co.*, 29 New York, 315; *Newson vs. New York Central R. R. Co.*, Id. 383; *North Pennsylvania R.R. Co. vs. Heileman*, 49 Pennsylvania State, 60; *Catawissa R. R.*

Co. vs. Armstrong, Id. 186; *Galena etc. R. R. Co. vs. Dill*, 22 Illinois, 271; *Ernst vs. Hudson River R. R. Co.*, 24 Howard's Practice R. 97.

Whether neglect to give signal is conclusive evidence of negligence. *Galena etc. R. R. Co. vs. Dill*, 22 Illinois, 271; *Chicago & Rock Island R. R. Co. vs. Reid*, 24 Illinois, 144.

Where no signal is given, effect of negligence of injured party: *Steves vs. Oswego & Syracuse R. R. Co.*, 18 New York, 422; *Dascomb vs. Buffalo & State Line R. R. Co.*, 27 Barbour, 221; *McGrath vs. Hudson River R. R. Co.*, 32 Barbour, 144.

The New York Court of Appeals has recently ruled that although a traveler must make vigilant use of his eyes and ears in approaching a railroad track, to ascertain if there is a train approaching, he is not bound to stop for the purpose of listening, nor, if in a vehicle, to get out and go forward upon the track, nor to stand up in the vehicle to get a better view of the track. *Davis vs. New York Central etc. R. R. Co.*, 47 New York, 400. But as to what he must do, consult *Gorton vs. Erie Railway Co.*, 45 New York, 660; *Wilcox vs. Rome, Watertown etc. R. R. Co.*, 39 New York, 358.

Consult also the following decisions in regard to the duty of travelers in crossing a railroad track, and of Company in giving signals, etc.: *Chicago & Rock Island R. R. Co. vs. Still*, 17 Illinois, 500; *Chicago & Northwestern R. R. Co. vs. Sweeney*, 52 do. 325; *Chicago & Alton R. R. Co. vs. Gretzner*, 46 do. 74; *Toledo, Wabash & Western R. R. Co., vs. Baddely*, 54 do. 19; *Havens vs. the Erie Railway Co.*, 41 New York, 296, approving *Ernst vs. Hudson River R. R. Co.*, 39 New York, 61; *Wilcox vs. Rome & Watertown etc. R. R. Co.*, Id. 588. [*Reporter.*

THE QUICKSTEP.

CIRCUIT COURT.—DISTRICT OF INDIANA.—MAY TERM, 1870.

IN ADMIRALTY.

STEAMERS SIGNALING.

1. APPEAL BY ONE PARTY ONLY.—Where in a collision case, the District Court had found both parties in fault and divided the loss, and the respondents only appealed, the libellants are bound by the decree as to the fault on their part, and the Circuit Court on appeal cannot inquire as to that point. The only subject of inquiry is whether the respondents were in fault.

2. When on the Ohio river an ascending steamer has signaled to pass to starboard, and the descending steamer has accepted the signal, the first is bound to keep to starboard, and if necessary, pass farther to the right than the original course.

3. CHANGE OF SIGNAL.—If the ascending steamer then changes her signal, and the other answers that she will keep her course, the ascending steamer having meanwhile changed her course, and a collision ensuing, is in fault.

This was a libel filed by the owners of the steamer Ollie Sullivan against the steamer Quickstep, for a collision by which, it is alleged, the Ollie Sullivan was sunk in the Ohio river, in consequence of the negligence of those on board the Quickstep in the management of their steamer. The defendant answered denying any negligence, and insisting that the result was caused by the fault of the Sullivan. On the hearing before the district court, both parties were found in fault, and the loss and the costs divided.

From this decree the defendant appealed. The libellants did not appeal.

T. A. Hendricks and *Asa Iglehart*, for libellants.

J. McDonald, for respondent.

DRUMMOND, J.—Notwithstanding the general rule that an appeal suspends the decree of the court below, and the cause is heard in this court *de novo*, and, in certain circumstances, the decree in all its parts may be subject to revision in the circuit court, where the district court has decreed against both parties and only one party appeals; yet, when in such a case as this the libellants were found to be in fault, and a decree for costs rendered against them, and they have taken no appeal, it must be assumed, I think, that they have acquiesced in the decree of the district court, and that it is not open to inquiry in this court whether or not the Ollie Sullivan was in fault. That stands concluded by the decree of the district court. The only subject of inquiry, therefore, in this court, is whether the Quickstep was also in fault, as found in the district court.[1]

The Ollie Sullivan, a small, stern-wheel steamboat, about eight o'clock of a dark, windy and rainy night in the month of April, 1869, was descending the river Ohio, on a trip from Evansville in this state, to enter the mouth of the Wabash river. The boat had just landed on the Indiana shore of the Ohio, a short distance below West Franklin, and almost immediately opposite the upper point of Diamond Island. In backing out from the shore to proceed down the river, the wind made the boat somewhat unmanageable, and it was necessary to back well over to the island before they could take their course down the river. The boat was on her way down the river, heading over towards the Indiana shore north of, and but a short distance from, Diamond Island; how far, is a controverted point in the case.

In the meantime the steamboat Quickstep, a side-wheel boat, was coming up the river, north of, and not far from, the Diamond Island shore. It was a larger, better steamer than the Ollie Sullivan, and more easily managed. Both steamers

[1] *Stratton vs. Jarvis*, 8 Peters, 4; *Houseman vs. Schooner North Carolina*, 15 Peters, 40; *Canter vs. American Ins. Co.*, 3 Peters, 307; *The Water Witch*, 1 Black, 494; *Airey vs. Merrill*, 2 Curtis, 8; *Allen vs. Hitch* Id. 147; *The Roarer*, 1 Blatchford 1.

had lights, but those of the Sullivan were not in the proper place as required by the regulations of the board of supervising inspectors, made under the 29th section of the act of Congress, of August 30 1852.[1] The pilot of the Quickstep saw the light of the Sullivan, and blew one whistle, which indicated that each was to go to starboard, or the Quickstep on the Island side, and the Sullivan on the Indiana side. The Sullivan answered with one whistle, the meaning of which was an assent to that mode of passing. Shortly after—how long is a matter of dispute—the Quickstep blew two whistles, indicating a change in the manner of passing, and the Sullivan again blew one whistle, showing that they adhered to the original purpose, that each should keep the starboard or right hand side. Here the testimony is altogether in conflict. Those on board the Sullivan say that as the Quickstep blew two whistles she began to swing off from the island toward the Indiana shore, and across the course of the Sullivan. Those on board the Quickstep insist that her course was unchanged, and that she stopped the engine and commenced backing at once. As soon as those on the Sullivan heard the two whistles and saw what they supposed was a change of course of the Quickstep, they stopped her engine and commenced backing; but it was all in vain, and the boats came together, the Quickstep striking with her stem the larboard bow of the Sullivan, turning her round with her head up stream, and shortly after she sunk, carrying down some of her passengers, who were drowned.

The question is whether the Quickstep was properly managed. It is difficult to decide how far apart the two steamers were when the first signal was sounded, and what was the interval of time between the first and second signals given by the Quickstep. Those on the Sullivan say the distance was five or six hundred yards; those on the Quickstep, much less. A good deal will depend, also, in deciding the question, upon the distance the Quickstep was from the island shore. Those having charge of her say it was from forty to sixty yards only.

[1] 10 U. S. Statutes at Large, 72.

Those on the Sullivan, that it was much more. After the Sullivan sunk, her distance from the shore was ascertained, and is given as being measured at one time one hundred and twenty-six feet, and at another one hundred and ninety-three feet. When the collision took place the river was high, and we know that when it was lower than at the time of the collision, steamboats passed, though not at night, between the wreck and the island shore. There is not entire concurrence in the testimony as to the course of the wind. It was probably blowing from the Indiana shore, and somewhat down the river. After the collision the steamers separated, and I think the weight of the evidence is that the Sullivan sunk nearer the shore than she was at the time of the collision.

Why did the Quickstep sound the two whistles for the second signal? It is always a dangerous experiment when two steamers are so near together, to announce one course and then another. It inevitably, under such critical circumstances, leads to difficulty and confusion. It is but fair to examine the reasons given for this conduct by those having charge of the Quickstep. The answer declares that at the time of the second signal the collision was unavoidable, and it was given to save life and property. The testimony of the pilot of the Quickstep, given under the influence of the responsibility resting on him, because he sounded both signals, and the Quickstep was under his immediate management at the time, is, that as he got above Priest's Landing (on Diamond Island), he saw a light, and was uncertain whether it was a steamboat light, and as a precautionary measure he blew one whistle, which was promptly answered by one whistle. He then rung the bell to stop, and then to back, and seeing it was impossible for the steamer to go outside (that is, toward the Indiana shore), and that, by backing the Sullivan might, by possibility, go inside (towards the island), and not do any great damage, he blew two whistles, in order to give the Sullivan that chance. This is the explanation in the answer, and of the principal witness for the claimant. It is to be observed that there does not seem to be any doubt

as to the course of the Sullivan immediately before the collision—heading down stream and quartering towards the Indiana shore. The form and depth of the opening made in the Sullivan by the collision, and the manner in which her bow was turned up the river, establish that the Quickstep struck the Sullivan rather a square than a glancing blow, and therefore would indicate some change of course; but however this may be, I think that the Quickstep was in fault in what was done by her when and immediately after the Sullivan was seen. Conceding the statement made by the pilot of the Quickstep when he first saw the light—that he thought it might be the light of another boat—we must then judge him by his acts. Knowing that it might be a steamer, he must also have known that it was a descending steamer, and therefore it was for him to sound either one or two whistles, to show that he wished to take the right or the left, and it was for the descending steamer to decide. Therefore, when he saw the light, upon the supposition it was that of a steamer, he must have believed he could go to the right, or he would not have blown but one whistle. Now there is no pretense that the Sullivan changed her course till the second signal was given, and it follows that if the pilot of the Quickstep could at the time he gave the first signal, see his way clear to go to the right, every passing instant of time, if the two steamers kept their course, would facilitate the movement, and if the Quickstep gave way to the Sullivan, as the first signal indicated she would if required, then its success was still more assured. Then when in fact the Sullivan, in answer to the first signal, blew one whistle, the pilot of the Quickstep knew that he must keep to the right, that is, the island shore, and should instantly have governed himself acoordingly; and if necessary, to avoid meeting the Sullivan, he should have ported his helm and gone nearer to the island shore than he was moving at the time. If this had been done at once, there would have been no collision, and I am satisfied the judgment of the pilot at the time was correct—that he could have gone to the right. I am also of opinion that there was fault in the

Quickstep in giving the second signal, and in her action at the time, though it may be difficult to determine precisely how much effect it had in producing the result. When the second signal was given the action of the Sullivan shows that those who managed her thought it safer not to change the original purpose, and that it was some act *done* by the Quickstep that induced the Sullivan to stop and back after the second signal.

It will be remembered that we are not considering whether the Sullivan was in fault. That, as has been already said, has passed into a decree from which no appeal has been taken, and therefore an omission of a duty required by the sixth rule of the supervising inspectors may be noticed. Diamond Island projects towards the Indiana shore, near Priest's Landing. It is called by some of the witnesses the shoulder of the island. The Quickstep, before the lights of either were seen by the other, was below the shoulder, and the Ollie Sullivan above, and it is probable each was so near the island, that when they were six hundred yards apart they could not be seen in consequence of the bend in the island. Under such circumstances the rule requires that at the distance of six hundred yards from the bend, the pilot of the ascending and descending steamer shall give a signal by a long sound of his steam whistle. This seems not to have been done by either of these steamers in this case.

In conclusion, I may add that I can have no doubt of the right of the Sullivan under the circumstances, to approach the shore of Diamond Island, as was done at the time. She was not confined to any particular part of the river; all that the law demanded was that she should be managed with due care and skill, and so run on the river as to comply with the rules of navigation when approaching or meeting other craft. The decree of the district court is affirmed.

A steamboat which gives a signal to another vessel for a departure from the ordinary rule of navigation, must take the hazard of the consequences of making such departure herself, whether she hears a response to such signal or not. *The St. John*, 7 Blatchford, 220.

Duty of ascending steamer meeting descending steamer defined: *Thorp*

vs. Steamboat Defender, 1 Bond, 397; *Western Insurance Co. vs. Steamboat Goody Friends*, Id. 459; *Schench vs. Steamboat Fremont*, Id. 57.

The respective rights and obligations as to keeping or changing their course, of steamers and sailing vessels examined, and rules stated: *The Scotia*, 14 Wallace, 170. And when moving on intersecting lines, at different rates of speed: *The Cayuga*, Id. 270. [*Reporter*.

SEVEN COAL BARGES.

CIRCUIT COURT.—DISTRICT OF INDIANA.—MAY, 1870.

IN ADMIRALTY.

1. ADMIRALTY JURISDICTION.—Under the decisions of the Supreme Court the admiralty jurisdiction of the district courts over all the navigable waters of the country must be considered as established.

2. SALVAGE being a branch of admiralty jurisdiction, the district court has the same jurisdiction over a case of salvage on the Ohio river as on the Hudson.

3. WHAT CONSTITUTES.—It is sufficient that the property be exposed to a chance which might destroy it, and that the labor, at some personal risk, substantially contributes to the salvage.

4. The fact that the owner is in pursuit, unknown to the salvor, does not deprive him of his claim.

5. Barges adrift on the Ohio river are a proper subject of salvage.

This was an appeal from a decree of the District Court dismissing a libel filed by Henry Huber and others for salvage against seven coal barges found adrift on the Ohio river.

The facts are fully stated in the opinion.

C. E. Marsh, for libellants, argued—

First. That salvage services were in their nature the same everywhere, and as meritorious when rendered upon a river as

on the high seas; and that the decisions of the Supreme Court of the United States, following the case of the *Genesee Chief*, establishing the admiralty and maritime jurisdiction of the national courts over the navigable western waters, brought the case within the ordinary salvage rules.

Second. That whether the property saved was at the time derelict or not, is a question that need be considered by the court only as a circumstance to aid in fixing the *quantum* of salvage. Courts have repeatedly awarded salvage compensation to salvors who have only aided the master and crew while they still remained on the vessel saved, working conjointly with the salvors in saving the vessel. Nor is actual, present, imminent danger, either to the property or salvors, necessary, though it may be considered in fixing the amount of compensation. *The James T. Abbott*, 2 Sprague, 101; *The Brig Susan*, 1 do 499; Note to same case 505; *The Phantom*, 1 Law Reports, Admiralty, 58; *The Collier*, Id., 83; *The Missouri's Cargo*, 1 Sprague, 260; *The Reward*, 1 W. Robinson, 176 (Eng.); *The Isabella*, 3 Haggard, Admiralty, 428; *Allen vs. The Canada*, Bee, 90; *The Delphos*, Newberry, 412; *The H. B. Foster*, 1 Abbott's Admiralty, 222.

Third. Barges are the subject of salvage, as well as vessels used in commerce. *A Raft of Spars*, 1 Abbott's Admiralty, 485; *Raft of Timber*, 2 Wm. Robinson, 251.

A. Dyer and *Asa Iglehart*, for respondents.

DRUMMOND, J.—These seem to be the material facts: The barges, of considerable size and strength, some of them being one hundred and thirty feet long and twenty-three or twenty-four feet wide, bulk-headed at each end, and some of them decked over, and altogether of the value of four thousand dollars, were fastened to the landing at Evansville in this state, on the Ohio river. They were all lashed together, and had been at the landing for some weeks. They were left there by the steamer Robert Fulton, which used them to tow coal into Evansville. Ervin F. Sansom had charge of them as the agent

of the Ardlie Coal and Iron Company. They were lying about half a mile below the place where the steamer was moored. On the 15th of September, 1868, the river being high and rising fast, and between five and six o'clock in the afternoon, some drift-wood having gathered around the coal barges, the pressure became so strong that it snapped the rope which held them to the shore, and they, with the drift, were borne by the current down the river. The rope, which was quite long, in breaking, wound around, more or less, the logs of which the drift was in part composed. Two of the libellants, Huber and Sheer, seeing the barges adrift and no one aboard, took a skiff and immediately followed them, with intent to save them. Friedly, the other libellant, soon joined them in another skiff. The drift and barges floated down not far from and along the Indiana shore. It was necessary, in order to stop the barges and tie them to the shore, that they should obtain possession of the rope wound around the logs of the drift-wood. Accordingly, one of the libellants got on the logs, and, jumping from log to log, with some difficulty and risk, succeeded in extricating the rope, and taking advantage of an eddy, two of them going ashore in a skiff with the line, or hawser, fastened it to two trees, and one of them remaining on the barges and gradually checking them with the hawser, succeeded finally in bringing the barges to land. Three of the barges, when they started, were more or less filled with water. They were all tied to the Indiana shore, about three miles below Evansville. By this time it was getting dark. The drift logs, which had caused the barges to break their fastenings, passed by the eddy down the river. Some time after the barges had broken loose, Mr. Sansom was notified of the fact, and gave directions to the captain of the Robert Fulton to secure them, and the latter, with two men, took a skiff from the steamer, and landing to obtain a line, at the spot where the barges had been fastened, proceeded down the river in a skiff after the barges.

It is not clear how far down the river the barges were when the captain of the Fulton and his two men started after them

in the skiff. It is probable they were a mile or more, as the captain says it was over an hour before he reached them. They arrived at the place where the barges were fastened, and were told by the libellants, who then first saw them, that the barges were all safe. The libellants deny that anything was done by way of assistance by the other three, but the latter all assert that the barges were more safely fastened to the shore by their aid. And this is probably true. After the barges were secured, all six men left them, went out into the river and took passage on board of the steamer Nimrod, then on her way up to Evansville. The libellants seem to have returned to the barges once or twice during the next few days, and claimed possession of them, while the captain of the Robert Fulton declares that he took control of them. A few days after, they were removed by the Robert Fulton, and then the libel was filed claiming salvage.

There is some controversy in the testimony as to whether the libellants incurred any personal danger in their efforts to secure the barges, and whether the latter were subjected to any risk in floating down the river. The weight of the evidence is that there was some danger to the libellants in what they did. The barges could not be said to be derelict, as within a short time after they broke loose the owner sent men to reclaim them. But it was growing dark, the river was high, no one was on board, and the barges had no lights, it is not certain that those who followed the libellants could immediately have stopped them, and there would have been undoubtedly a certain risk to the barges had they not been taken by the libellants.

There can be no doubt of the jurisdiction of the district court over a case of salvage on the Ohio river. Since the case of *The Genesee Chief*, 12 Howard, 443, and *The Hine vs. Trevor*, 4 Wallace, 555, and particularly the case of *The Tug James E. Eagle vs. Frazer* (2 *Legal News*, 105), decided at the last term of the Supreme Court of the United States, the admiralty jurisdiction of the District Court of the United States over all the navigable waters of this country must be

considered as established. Salvage is a branch of the admiralty jurisdiction, and the district court would have the same jurisdiction over a case of salvage on the Ohio or the Mississippi river as on the Hudson or the Delaware.[1]

The only question therefore in this case is, whether the acts done by the libellants, constituted a salvage service. The elements to make a case of salvage are, enterprise and daring, involving some personal risk, the danger of destruction or loss or injury to the property, labor and skill shown, and the time occupied, the value of the property, and the success of the effort by rescuing the same. It is not necessary that the risk or danger should be absolute; it is enough that at the time, the property is exposed to a chance which might destroy it. Neither is it necessary that the result should be brought about solely by the claimant of salvage; it is enough if his acts in this particular substantially contribute to the salvage even when others assist.[2]

Tested by some of these rules, this was a case of salvage. The barges were afloat on the river with no one on them. It was true they had broken from their moorings, and some one acting for the owner might follow them—how soon was unknown. The current was rapid, the river high, night was approaching, the property was valuable, there was a possibility it might be lost or seriously damaged, there was some personal hazard to the libellants, and the acts of the libellants essentially contributed to save it from loss. If they had seen the owner in pursuit, or known that it would be immediately made, and merely sought to anticipate him with a view of exacting a large compensation for the service, then there might be good reason for saying it was not a case of salvage. Bnt if it was understood that the fact that at the time of rescue the owner was in pursuit of his property floating down the river, deprived the party of the right to a liberal compensation by way of

[1] *McGinnis vs. The Pontiac*, 1 Newberry, 130; *The Bacon*, *Id.* 274; *Williams vs. The Jenny Lind*, *Id.* 443.

[2] 2 Parsons on Shipping and Admiralty, 282–292, and authorities there cited.

salvage, it would greatly tend to discourage efforts in that direction. The very object of the law of salvage is to promote commerce and trade, and the general interests of the country, by preventing the destruction of property, and to accomplish this by appealing to the personal interests of the individual as a motive of action, with the assurance that he will not depend upon the owner of the property he saves for the measure of his compensation, but to a Court of Admiralty, governed by principles of equity. In this case the libellants appear to have acted in entire good faith. They, at the time, knew nothing of the attempt of the captain of the Fulton to save the barges. They acted promptly and efficiently, and are entitled to a reasonable reward. The claimant tendered each of the libellants five dollars, and paid that sum into court.

Is this adequate compensation under the circumstances? There seems to be no established criterion in estimating the amount of compensation to be given in salvage cases. It depends very much in each case upon the view the court may take of the facts. The hazard run by the salvors, the peril to the property, its value, the extent of labor, the enterprise, skill, energy and daring exhibited in the rescue, and the number of salvors, all enter more or less into the consideration of the question, and determine whether the compensation shall be a mere *quantum meruit* for work done and time spent, or one-half, or even more, of the value of the property saved.

In this case the property was afloat on a river, not on the ocean; it was not, therefore exposed to the same danger as if it had been on or near the open sea. The personal risk was not very great, nor the labor long or arduous, and, therefore, a large remuneration should not be given. But the value of the property the libellants helped to save was considerable, and while I wish to do nothing in the administration of the law of salvage to excite unreasonable expectations on the part of those who may save property from peril on the water, I am constrained to say, that if in such cases more liberality were sometimes exhibited by the owner, many cases might be settled by the parties which otherwise reach the courts.

I shall allow the libellants, as salvage, the sum of two hundred dollars, to be equally divided among them.

The decree of the district court is, therefore, reversed, and a decree will be entered in this court in favor of each of the libellants for one-third of the whole sum awarded as salvage, together with costs.

It is proper to add that although my brother Davis did not hear the argument in this case, he has been consulted in relation to it, and concurs in this opinion.

JENKINS, Assignee etc., vs. MAYER.

District Court.—Northern District of Illinois.—May Term, 1870.

In Bankruptcy.

1. A man not knowing himself to be insolvent may pledge his property to another whose money he has unlawfully used, and such a transaction is not a preference void under the Bankrupt Act.
2. Such a pledge is equally valid if made by an agent, and his authority need not be in writing.
3. Money paid to redeem property thus pledged cannot be recovered by the assignee.
4. Clerks and agents are not supposed to have such entire control over the resources of their principal as to make their failure to meet an obligation of their principal an act of bankruptcy against him.

This was a petition by Robert E. Jenkins, as assignee in bankruptcy of D. S. Heffron, to set aside a certain transaction between the bankrupt and Constant Mayer, the respondent,

and to compel the restoration to the assignee of certain payments received in pursuance of the transaction thus attacked.

The facts are further stated in the opinion.

Rich & Noble, for assignee.

Hoyne, Horton & Hoyne, for defendant.

BLODGETT, J.–The facts elicited in the evidence are substantially these: Up to some time in August, 1869, the bankrupt Heffron and one A.H.Hovey were in partnership as seedsmen and florists, and also as dealers in statuary, pictures and works of art. For the better transaction of the latter branch of their business, they had a "fine art gallery," where articles in that line were exhibited and remained for sale on commission. In the course of this business Constant Mayer, one of the respondents, had forwarded to them a valuable picture, entitled "Good Words," to be sold on commission.

In August the co-partnership was dissolved, and the business of the firm continued by Heffron. In September or October this picture was sold for $3,000, to be paid for about the 1st of November. Some time in September Heffron left Chicago for the East, and entrusted the general management of his business to his former partner, Mr. A. H. Hovey, who had power to sign checks and notes. In the latter part of October a note of Heffron's came due at one of the banks in this city, and Hovey, having no other available resources, collected the amount due on the picture sold for Mayer, and used the proceeds for the payment of the note. Heffron, who was at the time at Utica, N. Y., on business, on being advised of this act on the part of his agent, wrote to Mayer, apologizing for the use of his money, and enclosing his draft at thirty days for the amount. On the receipt of this letter, Mayer at once wrote to Messrs. Hoyne, Horton & Hoyne, his attorneys here, directing them to proceed to collect the money at once by attachment, and denouncing Heffron for this unauthorized use of his money. When this letter came to the hands of Mayer's

attorneys here, Heffron was still absent, and Hovey in the general charge of his business. The attorneys called upon Hovey for a settlement of their client's demand, and informed him of their instructions in the premises. Hovey assured the attorneys that Heffron was abundantly solvent and able to pay his debts, but that he was unavoidably detained at the East by the illness of his wife, and that when he returned, which they expected would be in a few days, the money would certainly be paid, and proffered them security if they would not commence suit. The result of the interview was that Hovey, as attorney and agent for Heffron, made and executed a bill of sale under seal, absolute on its face, to Mayer for a lot of pictures, works of art, and other property, the value of which was about $5,400, as stated in the schedule thereof, but the real purpose of which was to make Mayer secure for the amount of his funds thus appropriated to Heffron's use by Hovey. At the same time this bill of sale was executed by Hovey the property described therein was nominally turned over to J. Albert Hovey, a young man who seems to have been partially employed about the premises, to hold for Mayer; but the goods were not removed from the store, nor their visible possession and ownership changed. It is conceded that A. H. Hovey had no authority under seal to execute the bill of sale, his sole authority in writing resting on a letter from Heffron, authorizing him to sign checks and notes, and attend to his, Heffron's, business. About the 1st of December Heffron returned, and resumed the control of his affairs. He was informed of this transaction between Hovey, as his agent, and Hoyne, Horton & Hoyne, as attorneys for Mayer, and replied, "he should not have done so, if here; yet, as it was done, the arrangement had better be carried out;" or words to that effect. Soon after his return a proposition was made by some customer to change a picture he had for one of those conveyed by the bill of sale, and pay the sum of $600 difference; and, after consultation with Hoyne, Horton & Hoyne, this exchange was effected, and the $600 was paid directly over to Messrs. Hoyne, Horton & Hoyne by the purchaser, and by them

credited to Heffron on the amount due Mayer. Subsequently Heffron placed a large portion of his works of art in the hands of an auctioneer for sale at auction, among which were a part of the goods included in the bill of sale, and a portion, about $600 or $800 worth of the goods mentioned in the bill of sale were sold. And on or about the 20th of December last, Heffron paid to said attorneys, for Mayer, $1,000 more. Since the commencement of the proceeding in bankruptcy against Heffron, another picture included in the bill of sale has been sold for $150, and the proceeds of which are in the hands of E. I. Tinkham, provisional assignee, subject to the decision of the questions involved in this cause. It is also agreed that a lot of potatoes included in the bill of sale have been sold for $240, and the proceeds are held subject to this decision. It is objected that this transaction is fraudulent as against the assignee of Heffron, because:

First. It gave Mayer, a creditor, an undue preference over the other creditors of Heffron.

Second. Hovey, the agent of Heffron, who executed the bill of sale, had no sufficient authority for his acts in that regard.

Third. Said goods were suffered to remain in the control of the bankrupt without visible change, or control, of possession.

In support of the first point numerous decisions by my predecessor and other district courts have been cited, all tending to establish the conceded point that any act intended to give a preference is void under the bankrupt act. The reason and authority of these decisions is not denied, but the question is, was this a case where a preference, such as is prohibited by the act, was intended. Heffron, by his agent, had unlawfully used the funds of Mayer coming into his hands, and had offered his draft, due in thirty days, for the money thus appropriated. Mayer refuses to accept the draft, but directs his attorneys to commence suit by attachment at once; and Hovey, who had acted for Heffron in the use of the funds, and who was still acting for him, proposed to turn over the goods in question to

secure the payment of the money, saying he had no doubt it would be adjusted immediately on Heffron's return, which was daily expected. And the attorneys of Mayer took the responsibility of accepting the security, instead of commencing suit as their client had directed. These facts seem to me clearly to take the case out of the class of cases cited. There is no pretense that Mayer or his attorneys had any actual knowledge of Heffron's insolvency at the time this transaction took place, although there is evidence going to show that he was, in fact, insolvent at the time, but was not himself aware of the fact, nor was Hovey, his general agent, so aware. But it is claimed that the cases cited show that "insolvency consists in present inability to pay debts," and that Mayer, through his attorneys, knew that he could not pay this debt, and was therefore insolvent. This rule might apply if Heffron had been present and the negotiations had been with him. But he was absent, and that absence was alleged as the sole reason for non-payment, and the reasons given for such absence were not such as would excite any suspicion of insolvency or present inability to pay Clerks and agents are not supposed to have entire control of the resources of their principal to such an extent as to make their failure to meet an obligation of their principal an act of bankruptcy against him.

And, in this case the proof is ample that no suspicion of insolvency had entered the mind of Heffron or his agent, Hovey. The bill of sale was executed as a temporary expedient to indemnify the attorneys for the responsibility they took in disregarding the instructions of their client, by withholding the suit he had instructed them to commence.

I do not think, therefore, that the evidence shows this to be a case of fraudulent preference of a creditor within the bankrupt act, and the cases cited which have arisen under it.

In regard to the second point, that Hovey had no authority to execute the bill of sale, I deem it sufficient to say that it did not require a written authority, and that Mr. Heffron, before the proceedings in bankruptcy, and immediately on his return, ratified the act of Hovey and acquiesced in the same.

It is objected that the bill of sale being under seal, the ratification must be by as solemn an instrument; but this, I apprehend, only applies when it is necessary that the original should have been under seal. As to the other objection, that the goods should have been separated, the evidence shows they were placed in charge of J. Albert Hovey, and that Mr. Heffron acquiesced in his assumed custody; and as there is no evidence that any creditor or purchaser was deceived or misled, I shall deem it good between the parties, and only concede to the assignee the assertion of such rights in regard to the property as Heffron might have asserted at the time proceedings in bankruptcy were commenced.

As to that part of the petition which claims a refunding to the assignee of the money received from Heffron since the bill of sale was executed, this depends upon the question whether the transaction between Heffron, through Hovey, his agent, and Mayer, through his attorney, was valid, and whether that, although an absolute sale on its face, was, in fact, only a pledge. Having come to the conclusion that this was a valid pledge of the goods, it seems to me that money paid to redeem the goods from that pledge cannot be recovered back. It seems clearly for the interest of the estate that the goods thus pledged, being of much greater value than the debt, should be redeemed, in order that the creditors may have the benefit of the excess in value over the debt secured by them.

A mortgage of personal property may be valid against the assignee in bankruptcy of the mortgagor, even though it be not recorded, nor possession of the property delivered to the mortgagee. *In re Griffiths*, 3 Bankrupt Register, 179. Also an unrecorded deed of real estate. *In re Wynne*, 4 do 5.

The assignee in bankruptcy, except in cases of fraud, stands in no better situation than the bankrupts themselves. *Winsor vs. McLellan*, 2 Story, 492.

When a sale by the bankrupt before bankruptcy is void as to creditors under a state law, the assignee may recover the property. *Allen vs. Massey* Chicago Legal News, Vol. 2, 309.

For a full discussion of the rights of creditors and the validity of liens consult *In re Wynne*, 4 Bankrupt Register, 5, opinion by Chief Justice Chase, where it is held that the assignee takes the property of the bankrupt "in the same plight in which it was held by the bankrupt when his petition was filed." [Reporter.

Ex parte ROBINSON.

CIRCUIT COURT.—DISTRICT OF INDIANA.—JUNE TERM, 1870.

PATENT RIGHTS—CONSTITUTIONALITY OF STATE LAW.

1. The legislature of a state has no right to interfere with the enjoyment of property in inventions, or to annex conditions to the grant.

2. If a patentee complies with the laws of Congress on the subject, he has a right to go into the market anywhere within the United States and sell his property.

3. A state law regulating the sale of patent rights is void.

Petition by Major J. Robinson for writ of *habeas corpus*.

The petitioner, being the duly authorized agent of the owners of certain patents granted to Henry B. Goodyear, administrator, and to John A. Cummings, offered, on the 23d day of May, 1870, to sell to Harrison H. LaFever, a dentist in the county of Grant, in this state, the right to use the invention patented, for dental purposes, within said county, for the sum of $100, which the said LaFever agreed to pay. Before the sale was completed, the district attorney of the county instituted proceedings against the petitioner under the provisions of an act of the Legislature of Indiana, entitled "An act to regulate the sale of patent rights, and to prevent frauds in connection therewith."

These proceedings resulted in the petitioner being committed to the jail of the county, before offering to sell the patent right because he had failed to comply with the terms of the law.

The statute is as follows: "It shall be unlawful for any person or persons to sell or barter, or offer to sell or barter, any patent right, or any right which such person shall allege to be a

patent right, in any county within this state, without first filing with the clerk of the court of such county copies of the letters patent duly authenticated, and at the same time swearing or affirming to an affidavit before such clerk that such letters patent are genuine, and have not been revoked or annulled; and that he has full authority to sell or barter the right so patented, which affidavit shall also set forth his name, age, occupation and residence, and, if an agent, the name, occupation and residence of his principal. A copy of this affidavit shall be filed in the office of said clerk, and said clerk shall give a copy of said affidavit to the applicant, who shall exhibit the same to any person on demand."[1]

Penalties are added for non-compliance with the provisions of the act.

S. A. Goodwin, for petitioner.

The statute of Indiana is entirely extra-jurisdictional, unconstitutional and void as applied to a patent right granted in pursuance of the laws of Congress passed by virtue of the 8th section of Art. 1 of the Constitution of the United States, in which power is given to Congress "to promote the progress of science and useful arts, by securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries."

The Supreme Court of the United States have held, in *McClurg vs. Kingsland*, 1 Howard, 206, and *Blanchard vs. Sprague*,, 3 Sumner, 541, that the power of Congress to legislate, under this article of the Constitution, upon the subject of patents, is plenary.

The power has been acted on in a series of laws, from 1790 to this time, which have established an entire system for securing to inventors their discoveries.

The patent issued in accordance with the act of 1836 (5 U. S. Statutes at Large, 117), grants to the applicant, his heirs,

[1] Statutes of Indiana, Davis' Supplement, p. 864.

administrators, executors, or assigns, for a term not exceeding fourteen years, the full and exclusive right and liberty of making, using and vending to others to be used, the said invention or discovery.

Section 11 of said act is "that every patent shall be assignable in law, either as to the whole interest or any undivided part thereof, by any instrument in writing; which assignment, and also every grant and conveyance of the exclusive right, under any patent, to make and use, and to grant to others to make and use, the thing patented, within and throughout any specified part or portion of the United States, shall be recorded in the Patent Office within three months from the execution thereof."

Section 14, "Damages may be recovered by action on the case, in any court of competent jurisdiction, to be brought in the name of the persons interested, whether as patentees, *assignees, or as grantees of the exclusive right within and throughout a specified part of the United States.*" Section 17 makes all such suits at law or in equity originally cognizable in the United States circuit court, and such jurisdiction is exclusive. *Dudley vs. Mayhew*, 3 Comstock, 14; *Elmer vs. Pennel*, 40 Maine, 434; *Brown vs. Shannon*, 20 Howard, 56.

It has been definitely settled in the United States courts that this exclusive right is property of a peculiar character; it is created and controlled by the statute; the patentee is regarded as purchasing from the public. Curtis on Patents, 3d ed., sec. 167; *Potter vs. Muller*, 2 Fisher, 465; *Morton vs. Eye Infirmary*, 2 Fisher, 320; *Wintermute vs. Redington*, 1 Fisher, 239. The courts will protect the patentee in the exercise of his exclusive privileges. *Ransom vs. Mayor*, 1 Fisher, 252.

It is also held that the patentee has, under his patent, three distinct rights, which he may dispose of separately to different individuals, to-wit: the right to make the machine; the right to use it; and the right to vend it; and also the right to divide his monopoly in the category of its locality, and thus create any number of exclusive franchises, each bounded by

the limits of a city, county or state. *Jenkins vs. Greenwald*, 2 Fisher, 37; *Burr vs Duryee*, Id., 275.

The paramount authority of the laws of the United States under Art. 6 of the Constitution has been vindicated from the leading case of *McCnlloch vs. Maryland*, 4 Wheaton, 316, down to *Crandall vs. The State of Nevada*, 6 Wallace, 35.

See also *Gibbons vs. Ogden*, 9 Wheaton, 186, 239; *Prigg vs. The Commonwealth of Pennsylvania*, 16 Peters, 573; *The Passenger Cases, Smith vs. Turner, and Norris vs. City of Boston*, 7 Howard, 283, 392, 464; *Sinnot vs. Davenport*, 22 Howard, 227; *Bank of Commerce vs. New York City*, 2 Black, 620; *Brown vs. Maryland*, 12 Wheaton, 419; *The Steamship Company vs. Port-Wardens*, 6 Wallace, 31; *Robinson vs. Rice*, 3 Michigan, 235; *Houston vs. Moore*, 5 Wheaton, 1.

This law impairs the obligation of contracts.

In *Whitney vs. Emmett*, Baldwin, 319, the court said: "A patent is a bargain with the public in which the sames rules of good faith prevail *as in other contracts.* * * * If a patent is valid, it gives to the patentee *a right of property* in the thing patented, which is entitled to full protection in the courts."

See also *Page vs. Ferry*, 1 Fisher, 298, and *Kendall vs. Winsor*, 21 Howard, 328.

A grant or private charter is a contract. *Dartmouth College vs. Woodward*, 4 Wheaton, 518, 656. See cases collated in Paschall's Constitution, pp. 155 to 158, and 2 Parsons on Contracts, pp. 509 to 516, and notes.

This law interferes with the jurisdiction of the United States Courts, established by Congress.

The jurisdiction given by the Constitution and the laws of Congress is exclusive.

The judicial power of the United States is vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish. Constitution, Art. 3, Sec. 1.

The judicial power shall extend to all cases in law and equity

arising under this Constitution and laws of the United States, etc. Constitution, Art. 3, Sec. 2.

By section 17 of the Patent Act of 1836, cases arising under any law of the United States concerning patent rights and inventions are originally cognizable in the courts of the United States. Under this section the courts have plenary power to hear and determine all questions of infringement and compensation. *Nevins vs. Johnson*, 3 Blatchford, 80; *Goodyear vs. Providence Rubber Co.*, 2 Fisher, 499.

The jurisdiction thus given, this state law attempts to qualify, limit and control. It undertakes to say that this court shall not take jurisdiction of the complainant's rights as secured to him by the laws of the United States, but only by the permission of the Legislature of Indiana, under the law of that state. It limits that jurisdiction to cases where the patentee has complied with all the formalities prescribed by the law of that state.

In the recent case of *Payne vs. Hook*, 7 Wallace, 425, the present Supreme Court held that, the equity jurisdiction and remedies conferred by the Constitution and statutes of the United States cannot be limited or restrained by state legislation, and are uniform throughout the different states of the Union.

And see *Fifield vs. Close*, 15 Michigan, 505; *Jones vs. Estate of Keep*, 19 Wisconsin, 369; *Warren vs. Paul*, 22 Indiana, 276; *The Moses Taylor*, 4 Wallace, 411.

DAVIS, J.—If this law is valid, the petitioner is properly held in custody; otherwise, he should be discharged.

This is an attempt on the part of the Legislature to direct the manner in which patent rights shall be sold in the state; to prohibit their sale altogether if these directions are not complied with, and to throw burthens on the owners of this species of property which Congress has not seen fit to impose upon them. I have not time to elaborate the subject, nor even to cite the authorities bearing on the question, and shall therefore content myself with stating the conclusion which I have reached.

It is clear that this kind of legislation is unauthorized. To Congress is given by the Constitution the power "to promote the progress of science and useful arts by securing, for limited times, to authors and inventors, the exclusive rights of their respective writings and discoveries." This power has been exercised by Congress, who has directed the manner in which patents shall be obtained, and when obtained how they shall be assigned and sold.

The property in inventions exists by virtue of the laws of Congress, and no state has a right to interfere with its enjoyment, or to annex conditions to the grant. If the patentee complies with the law of Congress on the subject, he has a right to go into the open market anywhere within the United States and sell his property. If this were not so, it is easy to see that a state could impose terms which would result in a prohibition of the sale of this species of property within its borders, and in this way nullify the laws of Congress, which regulate its transfer, and destroy the power conferred upon Congress by the Constitution. The law in question attempts to punish by fine and imprisonment a patentee, for doing with his property what the National Legislature has authorized him to do, and is, therefore, void.

The petitioner is discharged.

SHELLY vs. BRANNAN.

CIRCUIT COURT.—SOUTHERN DISTRICT OF ILLINOIS.—JUNE, 1870.

IN EQUITY.

INJUNCTION AGAINST INFRINGEMENT.—WHEN GRANTED.

1. If the rights under the patent are clear, and the infringement by the defendant free from doubt, and particularly after use of the invention by the patentee for a considerable time without controversy, the modern practice is not to compel the plaintiff in the first instance to proceed at law.

2. Under such circumstances it is the general practice to apply to the equitable side of the court for relief, which in a proper case is given without hesitation.

3. The patent never having been the subject of litigation, the complainant was ordered to file an injunction bond before the issue of the writ.

4. Griscom & Denn's patent for limekilns construed.

Motion for a provisional injunction to restrain the defendants from infringing letters patent for "an improvement in lime-kilns," granted to Powell Griscom and Charles S. Denn, November 17, 1857, to which a specification of additional improvements was annexed February 23, 1858.

The nature of the invention consisted in an arrangement embracing, for united operation, the following features: 1. An inverted, oblong, pyramidal lime basin in the base of the kiln, having discharge and clearing passages. 2. Fire grates and ash-pits, extending from the front to the back of the basin on each of the oblong sides of the same, but divided by central partitions. 3. A pyramidal burning stack, with a chamber of oblong, quadrilateral form at its base, and gradually running into an oval form as it terminated, and having fire chambers extending from front to back, but divided at the center by partitions, and having also lateral flame and hot air passages leading directly into the chamber of the pyramidal stack along the

whole width of the quadrilateral portion of the burning chamber.

The disclaimers and claim were as follows:

"We do not wish to be understood as claiming any of the parts separately; but we claim the peculiar combination and arrangement of the parts and for the purposes set forth."

The claim of the additional improvement was as follows:

"We claim the combination of the transverse partition with the oblong, inverted pyramidal basin, oblong stack and enlarged draft flues, when said flues are used as auxiliary furnace doors, the whole being arranged substantially as and for the purpose set forth.

Samuel S Boyd, for complainant.

Stuart, Edwards & Brown, for defendant.

DRUMMOND, J.—This is an application for an injunction by the complainant, as the assignee for the county of Madison, in this state, for a patent issued to Powell Griscom and Charles S. Denn, November 17, 1857, for an improvement in limekilns, together with additional improvements made by them thereto on February 23, 1858. The additions referred to in the latter improvement seem to be connected mainly with the construction of a central partition wall, which divides the basin stack and drain pits, thus constituting substantially two chambers or limekilns, out of one; and as the defendant has not used this, the improvement of February 23, 1858, need not be further considered.

The controversy turns on the nature of the original improvement of November 17, 1857; and as no serious question is made upon the validity of the patent of Griscom and Denn, upon the fact whether the defendant has violated the first patented improvement by the construction and operation of the limekiln used by him at Alton.

Perhaps the claim of the patentees might have been described with more clearness and precision in the schedule. The language is that they do not claim the various parts described separately, but the peculiar arrangement and combi-

nation of the parts substantially as described, and for the purposes set forth.

In examining the schedule of their invention it seems to consist of a peculiarly constructed lime basin at the bottom of the kiln, of an inverted, oblong, pyramidal form of fire grates and ash pits, extending from the front to the back of the basin and on each side of the same and on both sides of the kiln; but the fires are divided by a central partition so that the wind cannot blow through the ash-pits and furnaces from one side to the other of the limekiln, and having open air passages from the furnaces to the stack, the stack itself being constructed of a quadrilateral oval form. These parts are described in detail, and by reference to the drawings annexed to the schedule. Applying the claim to the description, what the patentees regarded as their invention was the combination of these various parts, as set forth by them, and for the purposes named.

Does the defendant use the limekiln thus patented to Griscom and Denn, and of which the plaintiff is the assignee for the county of Madison? We have no model produced by the complainant, as there should have been, of the limekiln described in the schedule, and covered by the original improvement of November 17, 1857; we have, therefore, only the description contained in the schedule and the reference to the annexed drawings to determine the natute of the invention.

There is a model produced which is alleged to be a correct representation of the limekiln used by the defendant, and comparing the affidavits and pleadings of the parties, it remains only to determine upon the substantial identity of the two limekilns. Undoubtedly there are points of distinction as insisted on in the affidavits filed by the defendant,

But treating the model offered in evidence as a true representation of the defendant's kiln, as I believe from the evidence it is, then the two kilns appear to be essentially the same. The basin and stack are substantially of the same form. The defendant's kiln, like the plaintiff's has an oblong, inverted, pyramidal basin, and a quadrilateral oval stack. It has, like

the plaintiff's the same construction of furnaces, grates, ash-pits, air passages and central partition to prevent the wind from blowing through the kiln, a peculiarity not known in Barnard's kiln, of which defendant's claims to be a pattern. In these and many other particulars which might be named, the kilns of the plaintiff and defendant seem to be substantially alike. If the kiln of the plaintiff is protected by the patent to Griscom and Denn, of November 17, 1857, which is not seriously controverted, then the defendant is infringing on the rights of the plaintiff.

Some objection was made to the interposition of the court by an injunction before the right at law had been established, and because that law could furnish adequate relief. But the modern practice is, if the rights under the patent are clear, and the infringement by the defendant free from doubt, and particularly after the use for a considerable time, without controversy, of the invention patented, not to compel the plaintiff in the first instance to proceed at law.

In many cases a remedy in that way is found to be incomplete; and, therefore, now in the contingency named, it is the general practice to apply to the equitable side of the court for relief which in a proper case is given without hesitation.

The injunction will, therefore, be granted in this case, but as the patent of Driscom and Denn has never been the subject of litigation, either at law or equity, and the defendants may desire the case should go to proofs and hearing, I will, if the defendant requires it, direct, before the writ issues, a proper injunction bond to be filed.

NINE HUNDRED AND TWENTY-EIGHT BARRELS OF SALT.

DISTRICT COURT.—NORTHERN DISTRICT OF ILLINOIS.—JUNE 1870.

IN ADMIRALTY.

GENERAL AVERAGE.

1. DUTY OF CARRIER AS TO VESSEL.—A common carrier by water is bound to provide a safe and sea-worthy ship, in all respects fitted to carry her cargo through the ordinary perils of navigation, and the failure of so essential a portion of the mechanism as the rudder, in a gale of no extraordinary violence, is sufficient evidence that the vessel was unseaworthy in this regard.

2. The injury to the rudder being fairly chargeable to the common perils of the sea, the carrier is not protected by the exceptions in his bill of lading, and cannot charge the consequences against the cargo.

3. Having reached a harbor of safety, and it being practicable for him to gain a neighboring harbor of repair, the expense of towing the ship to her destination, incurred by the master, cannot be charged *pro rata* against the cargo.

4. To compel the cargo to contribute to the towage, it must be shown that this was the only reasonable alternative left to the master, and the soundness of his judgment may be questioned by the owners of the cargo.

Libel for general average by the owner of the schooner Emu.

The facts are fully stated in the opinion.

Rae & Mitchell, for libellant.

Waite & Clarke, for respondent.

BLODGETT, J. This is a libel upon substantially the following facts, as set up in the libel and shown by the proofs. The schooner Emu, on or about the 10th of September, 1866, took on board at the port of Oswego 2,330 barrels of salt, for the Salt Company of Onondaga, to be carried to the port of Chicago

at a freight charge of forty-two cents per barrel. On or about the 20th of said month said schooner encountered a heavy gale of wind while on Lake Huron, and when about thirty miles from Mackinaw her officers found that her rudder-post was split so that she could not be steered by her rudder, but by taking down the mainsail they were enabled to run into the port of Mackinaw in four hours. Here the captain sent his mate on shore to ascertain whether repairs could be made at that place so as to enable them to proceed on their voyage, and on being told that there were no ship carpenters at that place, he engaged the steam tug Leviathan to tow the schooner, with her said cargo on board, to her port of destination, and on her arrival here the libellants made this claim of general average against the schooner, cargo and freight, for the expense of said towage. The whole bill amounting to $1,715, being at the rate of $300 per day for five and one-half days for the tug; $50 for use of hawser, and $15 for the expenses of making the average.

The evidence shows that very little time was taken by the officers of the schooner to make inquiries as to whether the necessary repairs could be made at Mackinaw; that there were workmen at that point of sufficient skill either to put in a new rudder-post, or to have banded or repaired the old one, and that more thorough inquiry would have disclosed this fact. It is also shown by the proof that the port of Sheboygan, or Duncan harbor, seventeen miles from Mackinaw, was an entirely safe harbor, with mechanics who could have made said repairs, and plenty of available material for the purpose of such repairs; also that there were ample and safe docks and warehouses, where said cargo could have been unloaded and stored until another vessel could have been obtained.

It is contended on the part of the libellants that Mackinaw was not a port of repair, nor a safe port of refuge in all winds, and that the captain being the agent of the ship and cargo, his action in the premises is binding upon all, and cannot be questioned, except for fraud.

Nine Hundred and Twenty-eight Barrels of Salt.

The respondents resist the claim, and insist:

First. That the injury sustained by the schooner was not caused by the unavoidable perils of the sea, but was occasioned by the unseaworthy condition of the vessel.

Second. The cargo had ceased to be at risk and in danger at the time the expense for towing was incurred, the vessel having made a safe port where the cargo could have been unloaded and safely stored until sent forward by another vessel.

Third. That the rudder could have been repaired at Mackinaw with very little delay, and the vessel would have been safe in the harbor at Mackinaw while awaiting such repairs.

Fourth. That even if they could not have made the repairs at Mackinaw, they could have found every reasonable facility for doing so at Sheboygan or Duncan Harbor, only seventeen miles distant from the port of Mackinaw.

As to the question of fact involved in the first point, the evidence does not show that the gale was so violent as to have necessarily or probably broken or disabled the rudder-post of the vessel, if it had been sound and in good condition. The captain, in his deposition, says it was "blowing hard," when they found she did not answer her helm, and an examination disclosed the fact that the rudder-post was split. They took down the mainsail and worked into Mackinaw, then thirty miles distant, in four hours. This shows conclusively to my mind that the vessel did not become disabled by an unavoidable peril of the sea, but that, on the contrary, her rudder-post gave out from sheer insufficiency to withstand the ordinary vicissitudes of such a voyage as the vessel was then engaged upon.

A common carrier by water is bound by law to provide a safe and sea-worthy ship, in all respects fitted to carry her cargo in safety through the ordinary perils of navigation, and the failure of so essential a portion of the mechanism by which the vessel was navigated as occurred in this case, in a gale of no extraordinary violence, is sufficient evidence to my mind that the vessel was unseaworthy in this regard. If, then, this

injury to the rudder is fairly chargeable to the ordinary perils of the sea, and not to those of an extraordinary nature, the carrier will not be protected by the exception in his bill of lading, but must bear the damages consequent upon the accident himself. His first duty is to provide a safe, stanch and seaworthy vessel, and if he has not done so the consequences of that failure cannot be charged against the cargo, because it was the negligence of the carrier, and not an overruling Providence, that placed the cargo in peril. The burden, then, is upon the carrier to show that the disabling of the vessel was not the result of his own negligence, before he can call upon the cargo for contribution; and I am clearly of opinion that the proof in this case fails to make out any such state of facts on the part of the libellants.

But even if this point is not well taken, the proof shows that the vessel, with her cargo on board, arrived safely in the harbor of Mackinaw, and although there is some conflict of evidence as to whether she could have been repaired there, no doubt is left by the evidence that she could have been repaired at Sheboygan or Duncan Harbor, only seventeen miles distant, to which place she could have been worked by her sails, as she had already been thirty miles, or she might have been towed there by the tug she employed to tow her to Chicago. Instead of doing this, and apparently without making any inquiry or discussing the feasibility of any other expedient than that which he adopted, the master of the vessel resorted to the extraordinary measure of employing a tug at $300 per day to tow his vessel the remainder of his uncompleted voyage, about two-thirds having been accomplished.

It is true that, in a certain qualified sense, the master of the vessel is the agent of both ship and cargo, but it is a novel doctrine to assert that he is an agent whose conduct can in no case be questioned, and from whose decision there is no appeal. Primarily, his allegiance is to the ship, and his agency confined to such acts of discretion as are devolved upon him by the owners of his vessel, and it would be a truly dangerous doctrine to hold that the owners of the cargo could not ques-

tion the soundness of his judgment in a matter where they were interested against the carrier.

Here suitable or even casual inquiry among the residents of Mackinaw, would have disclosed the fact that he could repair his vessel at Sheboygan harbor. But he made no inquires, nor is there any evidence that he caused any to be made. He did not even go on shore himself. He only sent his mate ashore, who made some inquiries, very slight, and occupying only a few minutes of time, and being told there were no ship carpenters there, he at once engaged the tug to tow the vessel to Chicago, the captain ratifying this action of the mate. Here is an expense for towage of upwards of $1,700, which might by due inquiry and exertion have been avoided by the master of the vessel, and this court is asked to enforce a *pro rata* of this, amounting to nearly $500, against the cargo. It seems to me the conduct of the master is indefensible in this regard. He seems to have made, practically, no effort to repair his vessel, but engaged the tug without considering any other means by which the damage could have been repaired, and his vessel forwarded on her voyage in the usual way. The circumstances in which he was placed then did not, in my view of the case, justify the extraordinary expenditure incurred. The vessel could have been repaired either at Mackinaw or at Sheboygan harbor, and the master had no right to resort to the expensive alternative of employing a tug, at the expense of the cargo, to complete the voyage.

The evidence fails to show that the incurring of this large bill for towage was the only reasonable alternative open to the master of the vessel, and this the libellants must do before they can sustain this case. At the time the tug was chartered neither the vessel nor cargo were in peril. They had made a safe harbor of refuge, at least, and reasonable time should have been taken to fully canvass the situation, and decide upon the best course to pursue after full consideration and inquiry. It is not one of those mistakes of judgment made under stress of imminent peril, but the towing seems to have been resorted to more for the purpose of saving time to the vessel than for that

of saving a jeopardized ship and cargo. The repairs were not of so intricate or radical a nature as to require the ship to go into dry dock, nor the services of highly skilled workmen. Most experienced seamen know enough of carpentering and the use of tools to have repaired this rudder-post, and the chief peril of the ship seems to have been that of loss of time by the delay requisite to make the needed repairs, whereby another trip that season might be lost, rather than any such immediate danger to ship and cargo as justifies the sacrifice of part for the benefit of all.

Claim for freight allowed; contribution disallowed.

A carrier is bound to provide a vessel tight and stanch and properly furnished for her voyage. Abbott on Shipping, 5th American Edition, 417-19; *Lyons vs. Wells*, 5 East, 428; *Putnam vs. Wood*, 3 Massachusetts, 481; *Kimball vs Tucker*, 10 do 192; *Goodridge vs Lord*, Ibid, 483; *Bell vs Read*, 4 Binney, 127; *Clark vs Richards*, 1 Connecticut, 54.

Every freight contract by a carrier by river, implies that his boat is river worthy at the time, and it is incumbent on him to show that his boat is capable of performing it. *McClintock vs. Lary*, 23 Arkansas, 215.

For a full discussion of the law of general average and contribution, see Parsons on Shipping and Admiralty, Vol. 1, p. 338, and *sequitur*.

In *Backhouse vs. Snead*, 1 Murphy (N. C.) 178, the rudder was broken by the force of the sea, and the cargo, in consequence, lost. The rudder had the appearance of soundness, but proved to be internally rotten, though its rottenness was unknown to the owner—*held*, the carrier liable

Where the master in good faith incurs great expense in securing the safety of both ship and cargo, the cargo is liable to contribution without reference to the question whether the expense might have been lessened had the cargo been separated from the vessel. *McCarthy vs. Goodwillie*, 45 Illinois, 187.

The master has no power to bind the vessel for a contract to tow a disabled vessel from one port to another. *The Dispatch*, 5 Western Law Monthly, 209. [*Reporter*.

UNITED STATES vs. PRESCOTT.

DISTRICT COURT.—DISTRICT OF WISCONSIN.—JUNE TERM, 1870.

IN BANKRUPTCY.

1. PARTICULARITY IN INDICTMENT.—In an indictment under Sec. 44 of the Bankrupt Act, for obtaining goods on credit, with intent to defraud, the proceedings in the bankrupt court must be pleaded and proved with such particularity as to show affirmatively that an adjudication of bankruptcy was made upon a case in which the court had jurisdiction.

2. ITS REQUISITES.—The indictment, therefore, should set out the filing of the petition, the name of the petitioning creditor, the amount of his debt, the alleged act of bankruptcy, and the adjudication of the bankrupt court.

3. The description of the goods obtained, as "a large quantity of boots and shoes," is too uncertain. It should be as definite as would be required in a declaration in trover.

4. Offenses under Sec. 44 are misdemeanors, and the word "feloniously" should not be used.

5. DATES should not be specified by figures in an indictment.

This was a motion to quash an indictment under Sec. 44 of the Bankrupt Act, for fraudulently obtaining goods on credit.

The first count of the indictment charged that on a certain day mentioned, in the District Court of the United States for the District of Wisconsin, under and pursuant to an act of Congress entitled "An Act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867, proceedings in bankruptcy were duly commenced against Alphonso Prescott, Leander F. Snyder and R. H. Lovell, as insolvent debtors, and partners under the name of Prescott, Snyder & Lovell, who thereupon afterwards, to-wit, on a certain day mentioned were adjudged bankrupts; that prior to the dates last aforesaid, and within three months before the commencement of said proceedings in bankruptcy, to-wit, on the 16th day of August, 1869, within the jurisdiction of

this court, and at and in the district of Wisconsin, the said Alphonso Prescott, Leander F. Snyder, and R. H. Lovell, then and there representing themselves to be associated together as co-partners, under the firm of Prescott, Snyder & Lovell, and holding themselves out as wholesale merchants and jobbers of boots and shoes, under the false color and pretense of carrying on business and dealing in the ordinary course of trade of wholesale boot and shoe merchants and jobbers, did then and there wrongfully, unlawfully and feloniously obtain on credit, from one Lyman Dike, certain goods and chattels, to-wit, a large quantity of boots and shoes, of the value of five thousand dollars, with the intent then and there by the obtaining of said goods and chattels, to defraud the said Lyman Dike, contrary to the statute of the United States in such case made and provided, and against the peace and dignity of the United States of America.

There are other like counts of the indictment, except as to the names of persons from whom goods had been obtained by defendants.

James G. Jenkins, for bankrupt.

G. C. Hazleton, U. S. District Attorney, *contra*.

MILLER, J.—It is alleged in the motion to quash the indictment that it is defective in not setting forth the manner in which the proceedings in bankruptcy were commenced, and also in the description of the goods, etc.

The court exercises jurisdiction in bankruptcy as limited by the act; and proceedings must be commenced and prosecuted substantially as the act directs. Neither as to the proceedings, nor the jurisdiction of the court in bankruptcy, is it sufficient in an indictment under the act to rely merely upon a general averment. All matters necessary to constitute the offense must be pleaded. It is not sufficient, as in this indictment, to aver that proceedings in bankruptcy were duly commenced. It must be pleaded and proven, in order to convict, that a petition

in bankruptcy was presented to the district court by a certain creditor, naming him, and also the amount of the debt of such petitioning creditor, and the alleged cause of bankruptcy, and the adjudication of bankruptcy. It must appear affirmatively that the creditor had a right under the law to commence and prosecute proceedings in bankruptcy. The amount of his debt must appear, otherwise the court would have no jurisdiction.

Of the Bankrupt Consolidated Act of 12 and 13 Victoria, section 44 of the act under which the indictment in question was framed, is almost a literal copy. Several decisions of courts in England, as to requirements in the prosecution and trial of indictments under their act, were made and published before the passage by Congress of onr Bankrupt Act, and to which I refer as proper for consideration.[1]

It must appear that the bankrupt obtained goods within three months of the bankruptcy, by means of a representation which he knew to be false, that he was carrying on business and dealing in the ordinary course of trade, and such representations must be actually made by him.[2]

The description of the goods obtained by defendants is too uncertain; instead of a large quantity of boots and shoes, a certain number of pair of boots, and also of shoes, or a certain number of packages in boxes of boots, and also of shoes, should be described. This could be ascertained from the bills of sale. The description of the goods in an indictment should be as definite as in a declaration of trover.

The word "feloniously" should be omitted in indictments under the act. The offenses made indictable are misdemeanors. And in drawing indictments, figures for dates should not be used.

This being the first indictment in this court under the Bankrupt Act, I have prepared this opinion as a guide to the district attorney in future.

The indictment will be quashed.

[1] *Regina vs. Lands*, 88 English Law and Equity Reports, 536; *Regina vs. Ewinglin*, 41 English Common Law Reports, 178; *The King vs. Jones*, 24 do, 156.

[2] *Regina vs. Boyd*, 5 Cox, 502.

GOEDGEN vs. SUPERVISORS OF MANITOWOC COUNTY.

CIRCUIT COURT.—DISTRICT OF WISCONSIN.—JUNE TERM, 1870.

COUNTY BONDS.

1. MEETING OF SUPERVISORS MUST BE REGULARLY CALLED.—Where the statute of a state prescribes the manner in which a special meeting of the Board of Supervisors of a county shall be called, a special meeting held without observing these requirements is not legal.

2. OTHERWISE NO AUTHORITY TO SUBSCRIBE FOR STOCK AND ISSUE BONDS.—A board thus convened has no authority to initiate a proceeding to subscribe for stock in a railroad company and issue bonds in payment therefor, and proceedings based upon the action of such a meeting will be enjoined.

3. TAX-PAYERS MAY ENJOIN.—Proceedings preparatory to issuing the bonds must as substantially comply with the law, as in levying a tax for the payment of the debt, although in suits brought on such bonds by innocent holders, the court rejects proof of errors in or about the election, or in issuing the bonds. Objections made by tax-payers before the bonds are issued, are in time.

This bill was brought by complainants as aliens, alleging that they own real estate in the county of Manitowoc subject to taxation, of the value of six thousand dollars and upwards. By an act passed by the Legislature of this state, approved March 10th, 1870, entitled "An act to incorporate the Milwaukee, Manitowoc and Green Bay railroad company," it was provided, among other things, that the several counties upon, or contiguous to the line of the road as it may be located, were authorized to aid in the construction of the road by subscribing to the stock of the company, and paying for the same in money, and levying a special tax to raise money for that purpose, or by issuing bonds to said company in payment for said stock, and levying taxes to pay the interest as it accrues upon said bonds, &c., and to establish a sinking fund for the payment

of the principal, *provided*, that before any such aid be granted or contracted for by any such county, the question of granting the same shall be submitted to a vote of the electors thereof. The act further provided, that on the certificate of the president and secretary of the company under the corporate seal to the authorities of any such county that the line of the road has been located through or contiguous to said county, the said authorities might at their discretion call a special election to determine the question of giving aid to the company. Such election should be called, notice thereof given, the form of the ballots prescribed, and all regulations relating to the same determined by the proper authorities of the county, so that the question be fairly submitted to a vote of the electors.

A second act, approved April 9, 1866, entitled "An act to incorporate the Appleton and New London railway company," authorized the company to construct a railway between those points. And by an amendment to said act the company was authorized to extend its road, and build a branch road to any point where it will intersect the Sheboygan and Mississippi road, and to any harbor on Lake Michigan, with a proviso that nothing in the act shall be so construed as to prevent any city, incorporated village, town, or county, from subscribing to the capital stock of the company; and it authorized any of them to subscribe to such capital stock, and issue bonds in payment for the same, such issue of bonds to be authorized by a majority of the legal votes cast at an election to be previously authorized by the proper boards.

It was charged that the election upon the question of subscribing to the stock of those companies was not called nor conducted according to law.

It appears that the board of supervisors met on the 30th of March, 1870, in the office of their clerk, six members of the board being present, and one absent; that the ayes and noes were called on the question to submit to the voters of the county the propositions of the two companies, and that five voted in the affirmative and one in the negative. And it was

further voted that the clerk of the board and the sheriff of the county be authorized and instructed to give due notice of such election.

The last meeting of the board prior to the 30th of March was held on the 18th of that month, which adjourned *sine die*, and the meeting held on the 30th of March was a called and special session.

Winfield Smith, for complainants.

Wm. P. Lynde, for defendants.

MILLER, J.—The statute law of the state requires that a special meeting of the board shall be holden only by request of the members, addressed to the clerk in writing, and specifying the time and place of such meeting, and upon reception of such request, the clerk shall immediately transmit notice in writing to each of the members of the board. These requirements of the act were not observed. The meeting of the board was called by the clerk on the verbal request of members. The Legislature thought it proper that special and extra sessions of the board should only be held pursuant to the prescribed requirements. The call in this case was not sufficient in law to anthorize the board to meet and initiate a proceeding to result in contracting a debt on the part of the county to be paid by taxation.

The act incorporating the Milwaukee, Manitowoc and Green Bay company was approved March 10, 1870. On the 30th, the president and secretary of the company certified to the board that the line of the road was located through the county. On that same day notices were issued for the election to be held on the 12th of April. It does not appear that the board of supervisors prescribed the manner of holding the election, or of giving the notice, or the form of the ballots, or any regulations relating to the election. The clerk of the board and the sheriff issued notices of an election in the matter of aiding the two companies, and prescribed the form of the ballots,

pursuant to the resolution of the board on the 30th of March, that the clerk and the sheriff of the county be authorized and instructed to forthwith give due notice of such election. And the ballots were printed on the same sheet and not distributed by order of the board. It is apparent that the board had not complied with the act. The whole business seems to have been put through with too much haste to insure accuracy in the proceedings.

The dockets of this court and of other courts of the United States are filled with suits on corporation bonds issued in aid of railroad companies.

It is the settled rule of the courts to reject all proof of errors alleged to have been committed in or about the election, or the issuing of bonds, in actions by innocent holders. The court holds that objections should be made in a proper form by tax payers before the bonds are issued. This bill is brought in time. And I have no doubt the bonds can only be legally issued so as to contract a debt to be paid by taxation, in the manner prescribed by the law. Authorizing and holding the election and issuing the bonds must substantially comply with the law in every particular. The matter of complaint in this case is not technical, but substantial.

Proceedings preparatory to issuing the bonds must as substantially comply with the law as in levying a tax for the payment of the debt and interest.

Printing the two ballots on the same sheet of paper may not, possibly, of itself be illegal, but it would be a more satisfactory compliance with the act to have the question fairly submitted to a vote of the electors by supplying them at the polls with separate tickets.

For these reasons I am bound to grant the injunction prayed for in this bill.

I think complainants are entitled to claim the jurisdiction of this court. They are aliens, and they allege that the value of their estate is six thousand dollars. The principal and interest of the two hundred and fifty thousand dollars of bonds voted for must be paid by taxation. By the laws of this state

the property of complainants can be sold for taxes, and also the amount of taxes to be paid on these bonds for interest and principal by complainants would no doubt exceed the sum of five hundred dollars.

Consult *Mygatt vs. City of Green Bay*, Volume 1 of this Series p. 292; *Luling vs, City of Racine*, Id. 314, and cases there cited. Also Dillon on Municipal Corporations.

A similar case has recently been decided in the Illinois Supreme Court, being on a bill to enjoin the issue of county bonds to a railway company on the ground that the proper notice for the election had not been given, and the court held that unless the notice was in pursuance of the statute, the election was invalid and conferred no power upon the board of supervisors, either to make the subscription or issue the bonds, and that the injunction should be granted. *Harding vs. Rockford, Rock Island & St. Louis R. R. Co.*, reported in Chicago Legal News, May 31st, 1873; *The People vs. Tazewell County*, 22 Illinois, 147; *Fulton County vs. The Mississippi & Wabash R. R. Co.*, 21 do., 365; *Supervisors of Schuyler Co. vs. The People*, 25 do., 182; *Supervisors of Hancock County vs. Clarke*, 27 do., 305; *Marshall County vs. Cook*, 38 do., 44; *Wiley vs Town of Brimfield*, not yet reported. [*Reporter*

IDE vs. PHŒNIX INSURANCE COMPANY.

CIRCUIT COURT.—SOUTHERN DISTRICT OF ILLINOIS.—JUNE TERM, 1870.

IN EQUITY.

1. WAIVER OF CLAUSE IN POLICY.—A local agent of an insurance company may bind the company to waiver of the clause in the policy requiring formal proof of loss and barring suits not brought in one year. Statements that the proofs were "all right," and that the company would pay, amount to such waiver.

2. RECEIPT OF THE PREMIUM, by the agent binds the company, though the agent convert it, and a policy is never actually issued.

The complainant, in the fall of 1863, applied to John W. Lathrop, the local agent of the defendant at Jacksonville, Ill., for insurance to the amount of one thousand dollars, for the term of three years, upon his dwelling house in Morgan county. The agent, who was personally familiar with the property proposed to be insured, offered to insure it for that period for the sum of $13.50. Ide accepted the offer, and immediately paid in cash to the said agent the sum of $13.50 for said insurance; Lathrop, who was a dry goods merchant, and then very busy in his store, received the money, and entered it in his cash insurance record or book; but, alleging that he was then very busy, asked and prevailed on Ide to call at a later date to get his policy. Ide frequently, during the next few months, called in person or by agent at the store or the insurance agent to get his policy, but failed to do so on account of the absence of the agent, or his pressing engagements, or for other alleged immaterial reasons; Ide soon after temporarily removed to the State of New York, leaving the insured house in the possession of a tenant, which fact was well known to the agent of the insurance company. In the

fall of 1864 the house was burned by accidental fire, not within any of the exceptions of the policies of the defendant company, which neither before or after the loss ever issued a policy to said Ide. Lathrop never remitted the insurance premium to the Phœnix company, but converted it to his own use.

Ide gave prompt notice of his loss to Lathrop, at Jacksonville, who, after making inquiries, or professing to have made them, said that he was satisfied that the loss was all right, and no formal written proofs of loss were ever made or required. It further appeared by the depositions of Ide and three other witnesses, that Lathrop constantly professed himself satisfied with the proofs of the loss, promised payment of it to the complainant or his agents on different occasions, from the fall of 1864 to September, 1866, and constantly assured the complainant, and third persons, that Ide's loss was "all right," and would soon be paid. He also told Ide that the policy had been made out by him before the loss, but had been mislaid or lost, and that he had remitted the premium to the company, notified them of the loss, and that it was all right. In September, 1866, Lathrop finally notified Ide that the company would not pay the loss, nor do anything whatever.

At the March term, 1869, of the Morgan County Circuit Court, Ide filed his bill against the defendant, setting up the foregoing facts, praying for an interlocutory decree for the execution of a policy of insurance to him, and a final decree that the company pay the loss, interest, and costs. The defendant obtained a removal of the case to this court.

H. D. Atkins and *Gen. McClernard*, for complainant, cited *Tayloe vs. The Merchants' Insurance Company*, 9 Howard, 390, and cases there referred to.

H. E. Dummer and *B. S. Edwards*, for defendant.

TREAT, J.—Although the policies of the Phœnix Insurance Company all contain provisions requiring written and formal proofs of loss within thirty days thereafter, and barring all suits for losses not brought within one year after the happen-

ing of the losses, the agent of the company has sufficient authority to waive these formalities of proofs, and bind the company thereby; and the acts of Lathrop in this case amount to such a waiver. His acts and assurances in regard to the payment of the loss are also sufficient to bind the defendant, and to waive the clause barring suits not brought within one year after the loss.

The parol contract for insurance upon the complainant's house was valid, and could be enforced without a policy. The receipt of the premium by the authorized local agent of the company is a receipt by the company, and a failure to issue a policy after the payment of the premium cannot be taken advantage of by the company in a court of equity.

A decree will therefore be entered in favor of the complainant that the defendant pay to him within thirty days the amount of the policy contracted for, interest, and costs of suit.

The condition that no action shall be brought on the policy after a year from the time the right of action shall have accrued is not binding where the insurers caused the delay by holding out hopes of a settlement. *Grant vs. Lexington Insurance Company*, 5 Indiana, 23; *Coursin vs. Pennsylvania Insurance Company*, 46 Pennsylvania State, 323; or by promising payment after the expiration of the year; *Ames vs. New York Insurance Company*, 14 New York, 253.

Consult also *Curtis vs. Home Insurance Company*, Volume 1 of this Series, 485.

Certain acts held not sufficient to constitute a waiver of proofs of loss. *Smith vs. Haverhill Mutual Fire Insurance Co.*, 1 Allen, 297; *Boyle vs. North Carolina Mutual Insurance Co.*, 7 Jones' Law, 373. [*Reporter.*

WRIGHT vs. FULLERTON.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—JUNE, 1870.

IN EQUITY.

LIMITATION.—LACHES.

1. A bill in equity cannot be maintained upon a bond for the conveyance of real estate executed and delivered more than twenty years previously, the obligor having soon afterwards repudiated its obligation and thenceforth treated the land as his own and the complainant having in the meantime made no effort to enforce his rights.

2. The fact that he considered the bond worthless, did not suppose that he could collect anything from the defendant, and was not aware that he had any rights under it until advised by counsel, do not form a sufficient excuse for his laches.

3. *Seymour vs. Freer*, 8 Wallace, 202, distinguished: in that case both parties continued their relations under the contract, whereas, in this case one of them denied the claim of the other.

This was a bill filed by the complainant to enforce his equitable rights under a bond made by the defendant to one Albert Shephard, dated October 31, 1835, in the penal sum of $441, with a condition concerning the conveyance of three certain tracts of land therein described. The bond was assigned by Shephard to the complainant on the 4th of March, 1836.

The controversy covered two tracts of land in Cook county, Illinois: The E. ½ of the N. E. ¼ of Sec. 32, T. 38, N. R. 14, E. of 3d P. M., entered by Abner Lane; and the W. ½ of the same section, entered by Albert Shephard; the certificates for each having been assigned to the defendant in June, 1835. Also one tract of land in Milwaukee county, Wisconsin, the S. W. ¼ of Sec. 17, T. 7, N. R. 22, E. of 4th P. M., entered by Shephard, and conveyed to defendant by deed October 31, 1835. Patents were duly issued by the United States on each

of these entries, the purchase money being paid by defendant.

The condition of the bond was as follows:

"Whereas said Shephard has executed three notes to said Fullerton, as follows, to-wit: one dated June 27, for $100, payable one year from date, with interest at the rate of twelve per cent.; one for $100 dated August 22, 1835, payable one year after date, with like interest; and one for $70.50, dated July 1, 1835, payable one year from date, with like interest, it being one-half the purchase money advanced by the said Fullerton for the purchase of (the foregoing tracts of land). Now, upon the payment of said notes as aforesaid, the said Fullerton agrees to execute to said Shephard a conveyance of one undivided half of said lots of land, or in case said lots of land shall have been sold, to pay said Shephard one-half the pro ceeds."

This bond was signed and duly acknowledged by the defendant. On the 24th of June, 1836, the defendant sold one undivided half of the Milwaukee land for four drafts on New York for $1800, each payable at four, nine, twelve and eighteen months, respectively. Only one of these drafts—the first—was ever paid.

When the first note named in the bond became due, the defendant said the amount was tendered by the complainant, and refused. After the last note fell due—some time in the fall of 1836—the complainant declared that tender was made of the whole amount due, and refused. The defendant denied this.

The only reasons given why the tender was refused on the part of the complainant were, because the defendant demanded twenty-five per cent. interest; on the part of the defendant, because the whole amount was not paid at maturity.

The only other transaction the defendant and the complainant appear to have had with each other afterwards, was this: In 1835 they and one Royal Stewart and Grant Goodrich, for the sum of $35,000, purchased block 1 of the original town of Chicago. They paid one-fourth of the purchase money, and gave a mortgage on the block for the balance. They then sold

lots, and made considerable improvements on the property. They were unable to pay the balance, and the mortgage was foreclosed, and the property lost. Those who had purchased lots from them made reclamations for the money, etc., they had paid.

Stewart and the complainant left Chicago, and the defendant and Goodrich had to compromise and settle these claims. A litigation of several years standing grew out of the failure of the parties to make titles to lots which they had sold, and this was maintained and finally settled by the defendant and Goodrich alone—Stewart and the complainant being residents of other states. In the meantime the complainant never moved in the matter of this bond, nor made any claim in relation to it until the bill was filed on the 22d of August, 1856, just twenty years from the maturity of the last note named in the bond. During all this time the defendant exercised control and ownership over the land, and paid the taxes. The reasons stated by the complainant for this long delay in prosecuting the claim set forth in his deposition as follows: He considered the bond worthless; he was told nothing could be collected from the defendant in 1840, 1841, and "along in those years;" that the defendant had put his property out of his hands; that the bond did not set out the state in which the lands were situate, and he did not know he had any rights till advised by counsel just prior to filing the bill.

Doolittle & Morris, for complainant.

Beckwith, Ayer & Kales, for defendant.

Drummond, J.—Perhaps the fair inference from the facts is, that Shephard had attended the sales of the lands, and had made selections, or had done something else in relation to the land, or for the defendant, in consideration of which, while the latter had paid all the purchase money, he agreed that the complainant might have one-half of the land, on reimbursing him one-half of the purchase money, with a certain interest. Shephard himself, though he appears to be living, was not a

witness in the case, and the proof as to the particular circumstances of the arrangement between Shephard and the defendant seems to be confined almost entirely to the documentary evidence, viz.: the bond itself, and the assignments and conveyances affecting the land.

Giving to these documents the construction most favorable to the complainant, I am of the opinion that he has slept too long upon his rights to permit him now to call upon a court of equity to enforce them. He was clothed with the equities of Shephard under the bond, on the 4th of March, 1836, more than twenty years before he filed his bill. Conceding that he stood in all respects in the place of Shephard, then upon payment of the notes as they fell due, he was entitled to a conveyance of one-half of the land, or if sold, to one-half of the proceeds. Taking either aspect of the case, as presented in the evidence, the result must be the same. If it be true that when the first note fell due payment was tendered by the complainant and refused, that was a denial of the right of the complainant *pro tanto*, under the contract. If, in the fall of 1836, the whole amount due on the three notes of Shephard was tendered and refused, that was a denial of the whole contract. Then, if we take the statement of the complainant, denied by the defendant, as true, in the fall of 1836 he knew that the defendant, from some cause, repudiated the obligation of the contract. Whether, on this hypothesis, the first and only payment on the sale of the undivided half—which the defendant claims was his own half—of the Milwaukee land, was at that time made, we do not know, but the complainant then had notice that the defendant repudiated his claim under the contract. Being thus met by the defendant, he submitted to that repulse without a motion to enforce it, for nearly twenty years. It is a fair inference, I think, that he acquiesced in the action of the defendant. Whatever view, therefore, we may take of the legal status of the parties under the facts, in 1836 a claim was made on one side, and refused or resisted on the other, and so, without a word further, the matter rested till Aug. 22, 1856.

The inference becomes irresistible when connected with circumstances already mentioned, and with others which may be referred to. The defendant treated the land thenceforth as his own, paid the taxes, disposed of some portion, has always retained a part of it down to the present time, and during all the time has been a resident of Cook county, Illinois, while the complainant in 1835 and 1836, and for a few years afterwards, was also a resident of Cook county, and then removed to Racine, Wisconsin, where he has ever since resided. Shortly after 1836, real estate greatly depreciated in value here, and so continued for several years. In 1856, when the bill was filed in this case, land had greatly risen in value. In addition to all this, the purchasers of block one in the original town of Chicago, of whom the complainant and defendant were two, had sold several lots of that block, and had received considerable sums of money, amounting to some thousands of dollars—a large part of which had been put in improvements on the block, and when, having lost all under the mortgage given to secure the three-fourths of the purchase money, they were called on to refund sums that had been paid them, the complainant was not here, and therefore, as years passed by, and nothing was said or even hinted by him of the bond of October 31, 1835, it is not impossible that his non-action may have been the result, in part at least, of the complications growing out of the liabilities incurred in relation to block one, and of the fear, if any claim were made under that, he might be met with a counter-claim. However this may be, the complainant rested till the statute of limitations had run against the notes to Shephard and the bond of the defendant, and having been silent so long, he cannot be heard now.

It has been said by the complainant's counsel, that this case is similar to the case of *Seymour vs. Freer*, decided by this court, and afterwards affirmed by the Supreme Court of the United States, 8 Wallace, 202. In some respects this case is like that, but if it were conceded that in substance the nature of the contract was the same, it must be borne in mind that the Supreme Court put the decision in *Seymour vs. Freer*

on the ground that nothing had ever been waived or lost by Price under the original contract. The language of the opinion of a majority of the Court is, "The devisees might have held the property, and denied that, under the circumstances, the trust subsisted any longer. If Price acquiesced, his rights would have been at an end. Price might also have expressly or tacitly abandoned his claim. This would have worked the same result. Both parties might have concluded to continue their existing relations. * * Was either of the alternatives adopted, and if so, which one? This is the turning point in the case." And because the court was of opinion that both parties continued their existing relations, the original contract was held to govern their rights.

If that were true here, the decision would necessarily be the same, but it is because one of the parties here signified his purpose to deny the claim under the original contract, and the other submitted thereto for nearly twenty years, that this court must treat the contract as the parties themselves treated it—as obsolete.

I have not referred to the circumstance of the case having been permitted to stand in court for so many years without action, even after the bill was filed, because this may have been with the acquiescence of the defendant or his counsel.

The bill will be dismissed.

This case was appealed to the Supreme Court, and the decree below affirmed by a divided court, no opinion being filed, and the case not reported.

Courts of equity will not aid in enforcing stale claims where the party has slept upon his rights. *Platt vs. Vattier*, 9 Peters, 405; *Hawley vs. Cramer*, 4 Cowen, 717; *McKnight vs. Taylor*, 1 Howard, 161; *Bowman vs. Wathen*, Id. 189.

The lapse of twenty years ordinarily operates as a bar to a suit in equity connected with the recovery of land. *Varick vs Edwards*, 1 Hoffman, 382; *Pipher vs Lodge*, 4 Sergeant & Rawle, 310.

As to when a vendee may bring his bill for specific performance, and what laches will stop him, consult *Peters vs. Delaplaine*, 49 New York, 362. [*Reporter.*]

CONRAD vs. DATER.

CIRCUIT COURT.—EASTERN DISTRICT OF WISCONSIN.—JUNE, 1870.

PURCHASE BY SAMPLE.

1. A purchaser on a warranty by sample is not bound to receive goods which do not correspond with the sample, and can recover the money paid for the same.

2. The fact that he has received the goods and paid the freight on them does not estop him, if he had no previous opportunity to examine them and ascertain their quality, By immediately notifying the vendor that he refuses to accept the goods he becomes entitled to a return of the money paid.

3. He can also recover the freight money on the ground that it was paid before he had an opportunity of knowing whether the article delivered was of the quality represented.

4. Such a contract of purchase is executory, and there is no legal way by which a man can be compelled to accept that which he had not agreed to buy.

5. He is not bound to receive the goods and then sue the vendor upon his warranty.

On the 18th of May, 1868, the plaintiffs, who were merchants of Janesville, Wisconsin, purchased in New York of the defendants, who were wholesale merchants in that city, four hogsheads of prime St. Croix sugar at fourteen cents a pound, as by sample shown. The sugar was shipped in the usual way by defendants, and arrived at Janesville on the 3d of June, 1868, and was carted to the plaintiff's store, and before the sugar was inspected or examined the freight, amounting to $47.50, was paid by them. On examination subsequently, the sugar proved to be of a different kind and quality from the sample.

At the time of the contract of purchase the plaintiffs paid the value of the sugar, amounting to $740.40. As soon as the

quality of the sugar was ascertained, the plaintiffs notified the defendants that they would not accept it, and that it was subject to their order. This action was brought for money had and received and money paid out and expended.

John Winans, for plaintiffs.

Conger & Sloan, for defendants, cited *Payne vs. Whale*, 7 East, 274; *Thornton vs. Wynn*, 12 Wheaton, 189–93; *Voorhees vs. Earl*, 2 Hill, 288.

DRUMMOND, J.—The sugar being a different article from what the plaintiffs had purchased they had the right to decide whether they would accept the same, and in order to determine this, they must have had an opportunity to examine it. It was not competent for the defendants to send a different article from that which the plaintiffs had agreed to buy, and then compel them to take it, and sue the defendants on their warranty; but under such circumstances the plaintiffs had the right to decline to receive it, notifying the vendors at once of the fact, demand the money which they had paid, and on failure of payment to bring this action. They could also recover for the freight which had been paid, on the ground that it was paid before they had an opportunity of knowing whether the article was of the kind and quality represented.

This is not like the case of a party receiving property with the knowledge that it did not correspond with the quality represented. In this case the contract was executory, and not executed. The plaintiffs had performed their part of the contract, and the defendants had not. This was an agreement to sell goods of a certain kind and quality, but they had not been delivered, and there is no legal way by which a man can be compelled against his will to accept an article which he had not agreed to buy. The plaintiffs are, therefore, entitled to recover the money paid for the sugar as well as on account of freight, and the defendants are entitled to take the sugar.

The judgment will be for the plaintiffs accordingly.

MILLER, J., concurring.

For a full discussion of the rights and remedies of the vendee of chattels sold with warranty, consult *Chandelor vs. Lopus*, 1 Smith's Leading Cases, 264, 275 and 281; *Outler vs. Powell*, 2 do, 82.

And even where there is no warranty, if the articles be of a decidedly inferior quality, the purchaser may rescind the contract, and on restoring the articles recover the purchase price: *Connor vs. Henderson*, 15 Massachusetts, 319; *Gray vs. Cox*, 4 Barnewall & Creswell, 108; *Jones vs. Bright*, 4 Campbell, 144; 4 Kent, 479, 480. [*Reporter*.

UNITED STATES vs. PRUSSING.

DISTRICT COURT.—NORTHERN DISTRICT OF ILLINOIS.—JULY TERM, 1870.

1. A certain percentage of alcohol being produced in the manufacture of vinegar, such manufacture is within the prohibition of the 4th section of the Act of July 20th, 1868.

2. Any mash, wort or wash from which alcohol might be separated by distillation, is "fit for distillation," even though such distillation might not be profitable, and the alcohol is never released from its impure state, but kept down by a sour ferment.

3. The intent of the Act is to require all the alcohol used in any of the manufactures of the country to be so separated that the tax can be assessed and collected thereon.

4. Congress has the power to compel all parties using alcohol to use tax-paid spirit, instead of generating it within the mass where it is to be subsequently used.

This was an indictment against the defendants, Prussing and Hitz, for having made and fermented on premises other than a distillery duly authorized by law, to-wit: in the vinegar factory of said Prussing, a molasses wash, fit for distillation and the production of spirits.

By agreement of the parties the case was submitted to the court for trial without a jury.

United States vs. Prussing.

J. O. Glover, U. S. District Attorney, for United States.

I. N. Arnold and *Leonard Swett*, for defendant.

BLODGETT, J.—Although in this case there is some conflict of testimony, mainly as to the ferment used in making the wort, or wash, described in the indictment, yet, in the view I take of the case, I propose to dispose of it upon the facts developed by the defendant's testimony, which are substantially these: The defendant, C. G. E. Prussing, is a vinegar manufacturer in this city, and has been so engaged for many years past. Prior to the passage of the revenue law of July 20, 1868, and after the passage of the act of Congress levying excise duties upon distilled spirits, he manufactured vinegar by distilling a grain mash, such as is used by distillers for the production of spirits, but instead of using a distiller's worm by which the vapor is condensed into spirits, the vapor was conducted directly into a tub of prepared water, where it was condensed until the requisite amount of alcoholic infusion was obtained, when the wash thus prepared was passed through the generators and converted into vinegar. At the time the act of July 20, 1868, was under consideration in Congress, and about the time it took effect, he, Prussing, was in Europe, and on receiving from the defendant Hitz, who was his general superintendent in the business here, a copy of the proposed law, he wrote to Hitz that the distillation must cease as soon as the law went into effect, and that from that time forward he must manufacture vinegar by fermenting a molasses wash made in the proportion of one barrel of molasses to twenty barrels of water. Hitz, on receiving this instruction, consulted with Dr. Mahla, a leading chemist of this city, who, after some examination of the law, suggested the propriety of using vinegar or sour beer as a ferment in the wash, instead of using yeast, and in accordance with this suggestion the manufacture has since been carried on by making a wash in the proportion mentioned, and producing a fermentation by the addition of the necessary quantity of sour beer, that is, about one-third of a barrel of sour beer to a twenty-barrel tub of molasses and water.

The question to be considered and determined in this case is, whether the making of such a wort or wash is a violation of the 4th section of the act of Congress above referred to.

The portion of said act bearing upon this question is as follows: "Distilled spirits, spirits, alcohol and alcoholic spirit, within the true intent and meaning of this act, is that substance known as ethyl alcohol, hydrated oxyde of ethyl, or spirit of wine, which is commonly produced by the fermentation of grain, starch, molasses or sugar, including all dilutions and mixtures of this substance, and a tax shall attach to this substance as soon as it is in existence as such, whether it be subsequently separated as pure or impure spirit, or be immediately, or at any subsequent time, transferred into any other substance either in the process of original production or by any subsequent process; and no mash, wort or wash fit for distillation or the production of spirits or alcohol shall be made or fermented in any building or any premises other than a distillery duly authorized according to law, and no mash, wort or wash so made and fermented shall be sold or removed from any distillery before being distilled; and no person other than an authorized distiller shall by distillation, or by any other process, separate the alcoholic spirits from any fermented mash, wort or wash; and no person shall use spirits, or alcohol, or any vapor of alcoholic spirits in manufacturing vinegar or any other article, or in any process of manufacture whatever, unless the spirits or alcohol so used shall have been produced in an authorized distillery, and the tax thereon paid. Any person who shall violate any of the provisions of this section shall be fined for every offense not less than $500, nor more than $5,000, and imprisoned for not less than six months, nor more than two years; *Provided* that nothing in this section shall be construed to apply to fermented liquors."[1]

On the trial, the evidence of the three leading chemists of this city, namely, Drs. Mahla, Blaney, and Mariner, was taken, all of whom concurred in testifying that the fermentation of any

[1] 15 U. S. Statutes at Large, 125.

saccharine substance generated alcohol, and that acetic acid, or vinegar, could only be produced from such substances by first converting the saccharine matter into alcohol, and that the wash in question would contain about 4½ or 5 per cent. in volume of alcohol; that on being thus produced by fermentation, the alcohol existed as such in the wash, and that the process of distillation was only a mechanical method of separating the spirits from the other substances contained in the wash, the alcohol being the product ot the vinous fermentation; that the use of a sour ferment, like sour beer or vinegar, caused the alcohol thus evolved to change more rapidly into acetic acid than yeast, and Dr. Mahla testified that the only object of using the sour ferment was to make a wash which would sour or acidify so rapidly as that it would be practically unfit for distillation and the production of alcoholic spirits; that is to say it could not be profitably distilled. The vinous fermentation by which alcohol is produced is the same whether generated by yeast or either of the sour ferments mentioned, the only difference being in the rapidity of acidification after the alcohol is generated. All agree that for the purpose of distillation for the production of spirits for the market this sour ferment essentially injures the wash or wort, although alcohol can be obtained, and was obtained by two of these chemists, on analyses from the wash described in the proportion of about four and one-half and five per cent. in volume to the whole quantity. Yet the quality of the alcohol thus obtained was much deteriorated by the amount of acetic acid which had already formed by the change of a portion of the alcohol to acetic acid and all concurred in the statement that the acidification or acetic decay, as some of them termed it, took place much more rapidly by the use of the sour ferment than by the use of yeast, but that before the acetic acid could be produced the saccharine matter must first become alcohol. In other words, it is evident from the proof that the use of the sour ferment does not prevent the production of alcohol, but only causes it to change into acetic acid more rapidly after it is produced. The same qnantity of alcohol is evolved by one ferment as the other.

The question then turns upon the meaning of the words "fit for distillation," as used in the law above quoted. Certainly, according to the evidence, the wort or wash thus made, contains alcohol, which might be separated by distillation. Whether it could be profitably separated or not would depend on circumstances, such as the condition of the grain and other markets, the demand for the alcohol or the purpose to which it was to be applied after being produced. The alcohol is generated and brought into existence in the mass of the wort or wash by the process of vinous fermentation. Is the question of its fitness for distillation to be determined by the fact of whether it can be profitably separated from the mass by distillation or not?

The law declares that the tax shall attach to this substance "as soon as it is in existence as such," whether it be subsequently separated "as pure or impure spirit or be immediately or at any subsequent time transferred into any other substance, either in the process of original production or by any subsequent process." It would seem, then, that the purity or impurity of the spirit produced is not the test or criterion by which the fitness of the wash for distillation is to be determined, because the tax attaches to the spirit, whether pure or impure. So, too, the tax attaches to the spirit on its production, although it may be immediately or at any subsequent time transferred or changed into any other substance, either in the process of original production or by any subsequent process. Here the alcohol is generated and brought into existence as such, and by the peculiar qualities of the ferment used is rapidly, although not instantly or immediately, changed into acetic acid. I conclude, then, that the phrase "fit for distillation" is not synonymous with the phrase "fit for profitable distillation," but that it means capable of distillation and of the production of pure or impure alcoholic spirits.

The real question is, what did Congress intend by this specific prohibition of the making of such wort or wash in a place other than a distillery. The obvious intent of the law was to levy a tax for revenue purposes upon all alcohol and alcoholic

spirits entering into the composition of any of the known articles of manufacture in the country, and to require that the alcohol thus produced should be produced in authorized distilleries, where it could be measured and gauged, and its manufacture properly supervised by the revenue officers. The evidence shows clearly that alcohol is necessary for the manufacture of vinegar, and though the evidence shows that the defendants do use spirits that have paid the tax in their factory, yet I can see no reason why, if they can make a wash of saccharine material strong enough to produce four per cent. of alcohol, they may not make it strong enough to produce six or even ten per cent., and thus avoid the use of any distilled spirits, and prevent the receipt of any revenue from this source. The manufacture of vinegar by the vaporization of alcohol generated in such wash or mash as has been previously used by Prussing or other manufacturers prior to the passage of the act of July 20, 1868, is prohibited by this act, and the obvious intent of this law was to require all alcohol used in any of the manufactures of the country to be so separated as that a tax could be assessed and collected thereon. For many of the purposes of manufacture where a small proportion of alcohol only is demanded, the requisite amount could undoubtedly be generated by fermentation within the mass where it was to be subsequently made available; and were persons engaged in the manufacture of such articles to be allowed to generate their alcohol by fermentation without carrying the process forward to the separation of the alcohol by distillation, a large amount of the revenue derivable from the tax on alcoholic spirits would be lost to the Government. That, at least, seems to have been the view taken by Congress, and it is only for the court to inquire what Congress meant. It is certainly within the power of Congress to prohibit the production of alcohol in any except specified ways, and to throw such checks and guards around the production of this substance as to compel all parties using it to use tax-paid spirits, instead of generating the spirit, as in this case, within the mass where it is to be subsequently used, and there allow-

ing it to remain or be changed as the case may be. The very clause under which this indictment is found sustains the view which I have taken of the object of the whole section. Why make it a highly penal offence to make any mash, wort, or wash in a place other than a distillery, unless it was intended to prohibit the production of the alcohol which would be generated in such wort, mash, or wash? The making of the wort, mash or wash in such place could produce no injury to any one except by reducing the demand for alcohol to the extent to which it might be thus generated and used.

It is contended on the part of the defense, that the proviso to the section, "provided that nothing in this section shall be construed to apply to fermented liquors," authorized the fermentation of this wash, as shown in the proofs. But to my mind this saving clause of the section is intended to apply only to manufacturers of ale, beer, etc., and to protect them from the penalties of this section.

I therefore conclude after careful study of the law, that it was the intent of Congress to prohibit absolutely the fermentation of any compound whereby alcohol should be evolved, unless the same was done in an authorized distillery. Taking this view of the law, I am obliged to find the defendants guilty.

COTTRELL vs. ADAMS.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—AUGUST, 1870.

1. To enable the assignee of a mortgage to recover in ejectment the possession of the mortgaged premises, he must show a conveyance or grant to himself of the estate which he seeks to recover.

2. The assignment of a note and mortgage, with authority to the assignee to foreclose, does not transfer the legal estate nor enable the assignee to maintain ejectment.

This was an action of ejectment brought by the plaintiff as assignee of a certain mortgage given by the defendant, John Adams, to the Kenosha and Rockford Railroad Company for the premises in question. The mortgage was in due form, and, with the assignment thereof, was the only title which the plaintiff presented. No exception was taken by the defendant to the mortgage or assignment, but it was claimed that they did not make out such a legal title as authorizes a recovery.

The assignment under which the plaintiff claimed is as follows:

"Know all men by these presents, that the Kenosha & Rockford Railroad Company is justly indebted and promises to pay to Adam Cottrell, or bearer, one thousand dollars, on the first day of July, A. D. 1867, at the People's Bank, in the city of New York, together with interest thereon from and after the first day of July, A. D. 1857, at the rate of ten per cent. per annum, payable on each first day of January and July, on the presentation and surrender of the annexed coupons at said bank. To the payment whereof the said company hereby bind themselves firmly by these presents; and for the better security of such payment being made to the holder thereof, the said company have assigned and transferred, and by these presents do assign and transfer to the said holder of this bond, a certain note for the sum of $1,000,

executed by John Adams, together with a mortgage given, collateral to and for the purpose of securing the payment of the same, dated on the 16th day of June, A. D. 1857, payable in ten years from the first day of July, A. D. 1867, with interest at the rate of ten per cent. per annum, which said note and mortgage are hereto appended, and are transferable in connection with this bond to any parties or purchasers whomsoever, and not otherwise. And the said company do hereby authorize and empower the holder of this bond, at any time in case said company shall fail to perform any of the foregoing stipulations, by neglecting to pay either principal or interest on this bond when the same shall become due, to proceed and foreclose the said mortgage, or to take such other legal remedy on said note and mortgage against said mortgagor or against this company, on this present bond, or on both, as shall seem proper and expedient to said holder thereof."

Sleeper & Whiton, for plaintiff.

Winston, Campbell & Willard, for defendant.

Blodgett, J.—The only question to be decided is, whether this assignment is such a grant of the fee of the mortgaged premises as authorizes the assignee to maintain an action of ejectment for the recovery of the premises conveyed.

The rule is well settled that a mortgagee can maintain ejectment after condition broken, for the recovery of the mortgaged premises; but when an assignee attempts to exercise the rights of the mortgagee, it seems to me, he must, if he would attempt to recover the possession of the premises by ejectment, show a conveyance or grant to himself of the estate which he seeks to recover. And I do not think that this assignment is a grant of the fee in the land—the mortgaged premises. It authorizes the holder or assignee to proceed and foreclose the mortgage, or to take any other remedy at law or equity. Now there is no grant of the fee, and it is well settled that no person can recover possession in ejectment

unless he shows that he is entitled to the estate which he describes in his declaration. He has an equitable interest in the mortgage as assignee of the debt thereby secured.

But does the legal estate pass by the terms of the assignment? It seems to me not. There are no words of grant. There are no words by which it would appear that the assignor intended to convey the mortgaged premises themselves to the assignee. He simply authorizes and empowers the holder of this bond, "at any time, in case said company shall fail to perform any of the foregoing stipulations by neglecting to pay either principal or interest on this bond, when the same shall become due, to proceed and foreclose the said mortgage, or to take such other legal remedy on said note and mortgage against said mortgagee or against said company, on its bond or on both, as shall seem proper and expedient to said holder thereof."

Before ejectment can be maintained for the possession of the property, there must be an investiture of the legal estate in the plaintiff. I shall, therefore, be compelled to find for the defendant.

A mortgagee may in Illinois bring ejectment after condition broken. *Carroll vs Ballance*, 26 Illinois, 9; *Karnes vs. Lloyd*, 52 do, 113; *Pollock vs. Maison*, 41 do., 516; *Mornsin vs. Buckner*, Hempstead, 492; *Hughes vs. Edwards*, 9 Wheaton, 489.

As to how far mortgagee is considered as the owner of the fee, consult *Nelson vs. Pinegar*, 30 Illinois, 473; *Moore vs. Titman*, 44 do., 397.

The assignment of a note secured by mortgage carries with it only an equitable interest. *Edgerton vs. Young*, 43 Illinois, 464.

The transfer of a note secured by mortgage carries the mortgage with it. *Dick vs. Maury*, 9 Smede & Marshall, 448; *Henderson vs. Herrod*, Id. 631; *Burdett vs. Clay*, 8 Ben. Monroe, 287.

But the *estate* of the mortgagee can only be assigned by deed. *Warden vs. Adams*, 15 Massachusetts, 232; *Smith vs. Kelley*, 27 Maine, 237.

In Massachusetts the assignment of a mortgage debt is but an equitable assignment of the mortgagee's interest, and has no direct effect upon the legal estate. *Damon vs. Bryant*, 6 Gray, 564; *Young vs. Miller*, Id.. 152; *Crane vs. March*, 4 Pickering, 131; *Cutler vs. Haven*, 8 do, 49; *Warden vs. Adams*, 15 Massachusetts, 232.

In New Hampshire, however, as also in Pennsylvania, Ohio, and several other states, it is held that the assignment of a mortgage debt carries the

mortgagee's estate in the land, in the same manner as if passed by deed. *Page vs. Pierce*, 6 Foster, 317; *Sutherin vs. Mendum*, 5 New Hampshire, 420; *Smith vs. Moore*, 11 do, 55; *Rigney vs. Lovejoy*, 13 do, 247.

The assignment of the note or bond which a mortgage is intended to secure, unless there is some contract to the contrary, is an equitable assignment of the mortgage; and the assignee of the note or bond may use the name of the mortgagee to enforce the mortgage at law. *Graham vs Newman*, 21 Alabama, 497.

But if the mortgage itself is assigned in proper form, the legal title of the mortgagee passes to his assignee, and proceedings at law to enforce the mortgage must be in the name of the assignee. *Ib.* [*Reporter.*

In re QUINIKE.

District Court.—Northern District of Illinois.—August, 1870.

In Bankruptcy.

1. The 12th section of the Bankrupt Act does not authorize the granting of a discharge where the bankrupt, dying during the proceedings, has not taken the final oath prescribed by the 29th section.

Emil Quinike filed his petition in bankruptcy in this court in March, 1868. Warrants were issued and the proceedings were all regular up to July, 1868, when he died. An assignee was afterwards appointed and made disposition of the assets. This was a motion for a discharge under the act.

W. W. O'Brien, for bankrupt.

Blodgett, J.—This discharge is asked under the last clause of the twelfth section of the bankrupt act, which reads as

follows: "If the debtor dies after the issuing of the warrant the proceedings may be continued and concluded in like manner as if he had lived."

It is contended on the part of the bankrupt, therefore, that, notwithstanding his death, a discharge from his debts should be granted, but on an examination of the 29th section it will be found that no discharge shall be granted to any bankrupt until he shall take and subscribe an oath to the effect that he has not done, suffered, or been privy to any act, matter, or thing specified in this act as a ground for withholding such discharge, or as invalidating such discharge if granted.

This oath never having been taken by the bankrupt prior to his decease, and that being a condition precedent to the granting of the discharge, I am of opinion that the discharge cannot be granted. There is no authority in the court to grant the discharge until this oath has been taken by the bankrupt himself. No person can take it for him. The language of the last clause of the 12th section, although very comprehensive, must therefore be taken as applying to such proceedings as may be taken by the assignee or other parties in settling the estate, as the making of dividends, and so forth.

In re TERRY.

DISTRICT COURT.—EASTERN DISTRICT OF WISCONSIN.—AUGUST TERM, 1870.

JUDGMENT BY CONFESSION.

1. Where a creditor has reasonable cause to believe his debtor insolvent, he acquires no preference in bankruptcy over other creditors by taking from his debtor a promissory note with warrant of attorney to confess judgment, and levying an execution issued on said judgment note, on the debtor's stock of goods.

2. Although the warrant of attorney may have been given more than four or six months before the institution of proceedings in bankruptcy, yet if the lien of the execution only became operative within the six months, the creditor is entitled to no preference, and the limitations on the 35th and 39th sections do not apply.

This was a petition by John J. Fairbanks, judgment creditor of Terry & Cleaver, bankrupts, for an order requiring the assignee to pay their execution in full from the proceeds of sales of property coming to his hands, on the ground that his execution was a lien upon the property.

The facts are fully stated in the opinion.

A. R. R. Butler, for creditor.

Palmer, Hooker & Pitkin, for assignee.

MILLER, J.—John J. Fairbanks, a resident and business man in Milwaukee, at different times between the months of February and September, 1867, loaned to Terry & Cleaver, a firm in the same city, about $5,000. There were some propositions for a future business connection between these parties, which were not consummated. Under these propositions the money was loaned to the firm. In January or February, 1869, Fairbanks notified Terry & Cleaver that he wanted his money. He

was then given to understand that Cleaver would take up the loan by the first of July of that year, or make him outside security that would be negotiable. Terry at that time stated to Fairbanks that he was not able to raise the money. The indebtedness was in book account, and continued in that form until February 23, 1869. Not being satisfied that the loan should continue in that form, Fairbanks insisted on security. Terry & Cleaver informed him that their business would not justify their drawing that amount out, but expressed a wish to give him any security they could. A note with warrant of attorney was given by Terry & Cleaver to Fairbanks for the money on the 23d of February, 1869, payable four months after date. The debtors were frequently urged for payment of the money or part of it, without effect; but until judgment was entered on the note, no part of the money could be collected of the firm in cash. Before the judgment was entered, Fairbanks demanded of Terry & Cleaver a statement of their business, which they refused. Fairbanks testified that he made every effort to induce an arrangement for the payment of the debt before entering up the judgment. May 9, 1870, judgment was entered on the note and warrant of attorney in the Circuit Court of Milwaukee county, for $5,584.49, and execution was issued thereon the same day, and Terry & Cleaver's stock of goods levied on. They had no intimation or knowledge in advance of these proceedings. Fairbanks gave no publicity to the fact of having the note, except to friends, in a business way, not creditors of Terry & Cleaver. The note was made payable to Fairbanks alone, and not to his order or to bearer, at the request of Terry & Cleaver, as they did not wish it to be made public or negotiated. Fairbanks told them they need have no fear of anything of the kind, that he should probably take the note home, and put it in his cash drawer, and leave it there until it matured, and of course it would be left there longer unless it was taken up. Terry testified that when giving the note he told Fairbanks it was preferring a creditor, and would not give him any security over other creditors. And before the note was given, they told Fairbanks if

he pushed them it would break them up. Terry did not mention to any one their having given the note. Terry did not believe the note with warrant of attorney better security than a common note, and they did not intend thereby to give Fairbanks a preference over other creditors. And they told him if the note was a good security they would not give it to him. The money was used by the firm to replenish and increase their stock. The understanding was that Fairbanks should take the note out of the store and keep it. The interest for the year 1869 was not paid.

Proceedings in bankruptcy against Terry & Cleaver were commenced by creditors, June 6, 1870. These debtors were adjudicated bankrupts, and an assignee was duly appointed. The marshal having by virtue of a warrant taken possession of the stock of goods levied on by the sheriff under the execution in favor of Fairbanks, and sold them pursuant to an agreement between the parties, Fairbanks presented his petition, praying an order of court for the payment of the amount of his execution out of the proceeds of sale. To this petition the assignee and petitioning creditors in bankruptcy interpose an answer. . "They object to the order for payment; that said bankrupts, within four months prior to the commencement of bankruptcy proceedings, to-wit: on the 9th day of May, 1870, they being bankrupt and insolvent at that time, did suffer their property (their entire stock of goods) to be taken on legal process, to-wit, the execution issued on the judgment mentioned in the petition of said Fairbanks, with intent thereby to give a preference to said John J. Fairbanks, a creditor of said bankrupts, and with intent thereby to defeat and delay the operation of the bankrupt act. And that at the time said property was so taken, said Fairbanks had reasonable cause to believe that said Edward Terry and Albert B. Cleaver were insolvent, and that a fraud on the bankrupt act was intended. That Fairbank's judgment was rendered on a note dated February 23, 1869, payable four months after date, with a warrant of attorney to confess judgment thereon, of same date, by said Terry & Cleaver to said Fairbanks; the said

Terry & Cleaver being bankrupt and insolvent on said 23d of February, 1869, and so continued until the commencement of proceedings in bankruptcy against them, all of which said Fairbanks well knew; the pretended lien of said Fairbanks referred to in his petition being of no validity or effect, the same being void under the bankrupt act." Fairbanks supplied Terry & Cleaver with money to the amount of $5,000 through the summer of 1867, under some understanding between the parties that upon certain conditions a co-partnership might be entered into between them. The only written evidences of debt consisted of entries in a book in the nature of charges against Terry & Cleaver as debtors for money loaned, until February 23d, 1869, the day on which the judgment note was given. The parties, Fairbanks, Terry and Cleaver, resided in Milwaukee, and had very frequent interviews respecting this loan and securing it. There is no doubt, I think, but that Terry & Cleaver were in an insolvent condition in their business at the date of the note. The note was not given for a present consideration, but to secure a pre-existing debt. Fairbanks had notice from Terry & Cleaver when the note was received by him, that if he pushed them their business would be broken up, and that they could not take the amount of that debt out of their business. He also had notice that a judgment note, taken under these circumstances, was not valid as against other creditors. The condition of these debtors did not improve, but grew worse, so that they were not able to pay the interest on the note for the year 1869. There can be no doubt but that Terry & Cleaver were insolvent, and that Fairbanks had reasonable cause to believe them so at the date of the levy of his execution on the stock of goods.

On the execution of Fairbanks, on the 9th of May, 1870, which was about a month before the petition in bankruptcy was brought, the limitation of six months did not apply. But if the giving the note with warrant of attorney to confess judgment had been the only act of bankruptcy alleged in the petition against Terry & Cleaver, the limitation of six months would have barred the proceedings in bankruptcy.

It is contended that the limitation should also be applied to the claim of Fairbanks, as the note with warrant of attorney was given more than six months prior to the petition in bankruptcy.

The cause of bankruptcy alleged in the petition against Terry & Cleaver, is that they suffered their stock of goods to be taken on execution in favor of Fairbanks. His claim of preference must rest on his execution and levy. The note with warrant of attorney was merely an evidence of a debt; and first became an available security by virtue of the levy under the execution. The note with warrant of attorney to confess judgment was given to Fairbanks in February, 1869, pursuant to his frequent importunities for security. Instead of having judgment entered and execution issued and levied on the goods of his debtors, who were not even paying the interest for the year 1869, he locked up the papers in his money drawer, where he retained them until the 9th of May, 1870. In all that time he had frequent opportunities of inquiring into the financial condition of his debtors. And in the course of that time the firm of Terry & Cleaver contracted debts to a large amount for borrowed money and for goods purchased on credit. It does not appear that these creditors had any knowledge of the existence of the judgment note before the service of the execution. If Fairbanks were permitted, after concealing the evidence of his intended preference over other creditors, to their prejudice for that length of time, to obtain by means of the execution payment of his debt in full, the great object of the bankrupt act, equality among creditors, would be frustrated. There can be no doubt but he had reasonable cause to believe Terry & Cleaver to be insolvent before and at the time he entered up judgment and issued execution.

For these reasons I am constrained to deny the prayer of the petition.

The preference on a judgment note is obtained when the judgment is entered. *Golson vs. Neihoff*, January, 1871, *post p.* 484.

It is not a sufficient answer to say that the warrant of attorney was given to secure a *bona fide* debt, and that at the time the creditor had no knowledge of the debtor's insolvency. The question depends upon his knowledge or information at the time he made his warrant operative. Id.

That the giving a note with warrant of attorney is a preference, &c.; see *Campbell, assignee, &c., vs. Traders National Bank*, January, 1871, *post p.* 423; *In re Dibblee*, 2 Bankrupt Register, 185; *In re* McGie, *Ante p* 163.

And a judgment may be a preference and be set aside even though obtained in due course of law, if *suffered* by debtor. *Beattie, assignee, &c., vs. Gardner*, 4 Bankrupt Register, 106; *Smith, assignee, &c. vs. Buchanan*, Id. 133.

It has been held by Blodgett, J., that under certain circumstances the lien of an execution is transferred to assets in the hands of the assignee. *In re Weeks*, *ante p.* 259.

And the Supreme Court has lately decided that a creditor who, having reasonable cause to believe his debtor insolvent, commences suit in a state court, and obtains judgment, execution and levy, does not obtain a valid lien as against an assignee in bankruptcy proceedings commenced within four months subsequent to such judgment. *Buchanan vs. Smith, assignee, &c.* Am. Law Reporter, Apl. 7, 1878. Opinion will appear probably in 15 Wallace. [*Reporter*.

In re ELDRIDGE.

CIRCUIT COURT.—EASTERN DISTRICT OF WISCONSIN.—OCTOBER, 1870.

IN BANKRUPTCY.

MORTGAGE ON AFTER-ACQUIRED PROPERTY.

1. A mortgage of personal property being, under the laws of Wisconsin, ineffectual to pass after-acquired property, the assignee in bankruptcy is entitled to such property as against the mortgagee.

2. Though a mortgage be valid as to property then in possession, the authority in a mortgage subsequently given to cover the property afterward acquired, does not enable the mortgagee, by taking possession of such property, to hold it as against the assignee. This would be, in effect, a preference, and against the spirit of the act.

3. A mortgagee in possession being entitled to retain all property upon which his mortgage was valid, on a sale of such property by order of the district court, he should only be charged with the reasonable expenses of the sale of such property, and not with any portion of the costs in bankruptcy.

4. A chattel mortgage "of all the goods and merchandise" in a store, here held not to include fixtures.

Spencer Eldridge and Leslie R. Treat were merchants engaged in business in Janesville in this state, and on the 1st day of April, 1867, borrowed of Robert B. Treat, two thousand dollars. They continued business until November 21, 1867, when Treat sold out his interest to Fenton F. Stevens. Eldridge and Stevens became responsible for the debts of Eldridge and Treat and among the rest for the debt due Robert B. Treat. On the 12th of March, 1868, Stevens sold his interest in the firm to Eldridge. Robert B. Treat agreed to release Stevens, and Eldridge agreed to pay Robert B. Treat and the other debts of Eldridge and Stevens. Eldridge, on the 13th of March, 1868, gave Stevens a mortgage for $3,200

on his stock. At this time the stock was estimated to be worth between eleven and twelve thousand dollars. On the same day Eldridge gave a second mortgage to R. B. Treat, to secure his debt of two thousand dollars. These mortgages purported in terms to cover all after-acquired property.

On the eighth day of May, 1868, Eldridge gave Stevens and Treat new mortgages intended to cover goods obtained since the 12th of March. These last mortgages made no reference to any after-acquired property. Between the 8th of May and the 15th of October, 1868, Eldridge had purchased and put into the store at Janesville a quantity of goods invoiced at $6,644.45. On the last named day Treat and Stevens took possession, under their mortgages, of all the goods in the store. On the 19th of October, 1868, a petition in bankruptcy was filed against Eldridge, and on the 30th of October of that year he was adjudged a bankrupt by the District Court for this District. The court decided that the mortgages were valid on all the goods in the store at the time the mortgagees took possession. The property was sold by the assignee under the order of the District Court, and the proceeds paid into court.

No question being made but that the mortgage of Stevens was prior to that of R. B. Treat, the District Court decided that out of the money in court there should be paid, in the first place, all the costs and expenses connected with the proceedings in bankruptcy and the sale of the goods; secondly, the mortgage of Stevens; and lastly, the balance to be applied upon the mortgage of R. B. Treat. There was not, in fact, without the after-acquired property, sufficient to pay the mortgages.

From this order the assignee appealed.

Conger & Sloan, for Stevens, 1st mortgagee.

Jackson & Ebberts, for Treat, 2d mortgagee.

Palmer & Cassidy, for assignee.

DRUMMOND, J.—The questions in this case must depend in part upon the law of Wisconsin. The 14th section of the bankrupt law declares that no mortgage of any goods or chattels made as security for any debt or debts in good faith and for present consideration, and otherwise valid, and duly recorded pursuant to any statute of the United States, or of any state, shall be invalidated or affected by the bankrupt law.

Under the law of Wisconsin, in order to render a mortgage of chattels valid, the mortgagee must be in possession, or the mortgage must be recorded in the manner particularly pointed out in the statute.

The Supreme Court of Wisconsin has held in *Chynoweth vs. Tenney*, 10 Wisconsin, 397, and in *Single vs. Phelps*, 20 Wisconsin, 398, that mortgages of personal property do not cover what is afterwards acquired—that as to such property it is in the nature of a revocable license to take possession.

The point is not entirely free from difficulty, but on the whole my opinion is that the mortgages of the 13th of March and the 8th of May, 1868, for the property actually in possession of the mortgagor at the time, are valid under the law of Wisconsin. They appear to have been executed in good faith and for a valuable consideration, and were duly recorded. I see no good reason, therefore, for disturbing the decree of the district court on that point. But as to the property afterwards acquired there was not a valid mortgage, but only authority to take possession, and the rights of creditors, under the bankrupt law, must depend upon its effect upon the property at the time the act was done which might be supposed to operate as a transfer. This was the taking possession under the license contained in the mortgage. Then Eldridge was insolvent and the mortgagees must have known it, or had reason to believe it. The 35th section of the bankrupt law declares in substance that if any insolvent person within four months before proceedings in bankruptcy are commenced by or against him, and in order to give a preference to a creditor, makes a transfer of his property, and the person to whom it is made has reasonable cause to believe him insolvent, the trans-

fer shall be void as to general creditors. It is true in this case there was not, in one sense, a transfer made on the 15th of October, 1868, because the instruction or authority to take possession of after-acquired property, as the Supreme Court of Wisconsin construes it, was given in the mortgages executed some months before. But it is not competent for a party to give this authority in relation to property which he may afterwards acquire, and thus prefer a creditor who shall take possession when he is known to be insolvent, and thus avoid the effect of the bankrupt law because literally he has not made a transfer. That certainly would be a facile method of evading the scope and spirit of the law. In legal effect it was a transfer within the meaning of the law. It was a continuing act from the date of the authority to the taking possession, the last act being the consummation of the transfer, and in this instance the transfer giving a preference, the mortgagor being insolvent, and the mortgagees knowing the fact. It must be treated as if a mortgage were made of the after-acquired property at the time the mortgagees took possession. It was in substance, then, the case described in the 35th section, and as against the assignee of Eldridge representing the general creditors, was void.

All the costs of the bankruptcy proceedings and expenses of the sale were, by decree of the district court, first to be paid out of the proceeds of the sale of the goods The mortgagees should not have been taxed with the costs of the proceedings in bankruptcy. To the goods included in their mortgages they had a legal right. Over the goods not included, the district court had complete control for the benefit of the general creditors. It is only the fund within the legitimate power of the court that should have been charged with the costs and expenses of the proceedings in bankruptcy. But we have to deal with the case as it stands. The goods of the mortgagees have been converted into money, and that is now in court, and it is not inequitable to charge them with what would have been reasonable expenses for the sale of their goods. If they had retained possession of them, this charge they would have been

obliged to meet, and to that extent the claim on the fund in court will be allowed, as it is not claimed that the goods were not fairly sold.

Fortunately, in this case there is no difficulty in determining the amount and value of the goods included in the mortgages, and what were afterwards acquired, and the proceeds of the sale in each case.

That part of the decree of the district court deciding that the after-acquired property was covered by the mortgages, and that all the expenses of the bankruptcy proceedings and of the sale of the goods should be first deducted out of the money in court, will therefore be modified, and the proceeds of the sale of the after-acquired property will be directed to be paid over to the assignee, deducting the sum of one hundred dollars, which is allowed as a proper charge for selling that part of the property. There is a question made as to the fixtures in the store at the time the mortgages were executed. In the mortgage to Stevens the property is described as "all of the goods and merchandise now in the store." In the mortgage to Treat it is described as "all of the stock of goods and merchandise now in the store, and fixtures.

It was understood throughout that the mortgage of Stevens should take priority over that of Treat, and it was first recorded; and therefore it becomes necessary to decide whether Stevens' mortgage included the fixtures. They were of the value of two hundred and sixty dollars. Under some circumstances the term "goods and merchandise in the store" might perhaps be presumed to include the fixtures there; but here there are facts which seem to limit the construction of the language in the Stevens mortgage to the goods and merchandise proper in the store. The mortgages were written by the same person, it is to be inferred, under special instructions from the mortgagor; and in the one the fixtures were omitted, and in the other the description of the property is substantially the same, save that the fixtures are added. The mortgages were executed together on the 13th of March, and the fair inference is that the Stevens mortgage was not intended to include the fixtures.

Consult *In re Kahley*, *post p.* 383, and *Harvey vs. Crane*, March Term. 1871, post—p. 496

The Bankrupt Act leaves all deeds and instruments of writing not expressly saved, to the general principles of jurisprudence. *In re Wynne*, 4 Bankruptcy Register. 5.

It is as much the policy of the Bankrupt Act to uphold liens and trusts when valid, as it is to set them aside when invalid. *Ib.*

The preference which the law condemns is a preference made within the limited time by the bankrupt, and not a priority lawfully gained by a creditor. *Ib.*

Where a mortgage embraces property situated in two states, and is not recorded in one of them so as to make it valid as to the property there, it may nevertheless be valid as to the property situated in the state where it was recorded. *In re Soldiers &c. Dispatch Co.*, 2 Bankrupt Register, 162.

A secured creditor should always prove his claim; any other theory is entirely irreconcilable with the provisions of the Bankrupt Act. If the enforcement of his lien satisfies his demand, the debt will be discharged; but if it does not, then the balance remains as a general claim against the estate, like all other unsecured claims. *In re Winn*, 1 Bankrupt Register, 131; *Davis vs. Carpenter*, 2 do, 125; *In re Ruehle*, Id. 175.

But if he makes his proof without reference to his lien or security, and without apprising the bankrupt court of its existence, he thereby waives his lien, and relinquishes it to the assignee. *Stewart vs. Isidor*, 1 Bankrupt Register, 129; *In re Bloss*, 4 *do*, 37; *In re Stansell*, 6 do, 188.

Costs in bankruptcy are left by the act entirely in the discretion of the court, and questions arising in relation to them must be disposed of on equitable principles. *In re Dumont*, 4 Bankruptcy Register, 4.

Creditors who have endeavored to have a mortgage *prima facie* fraudulent, declared void, are entitled to be reimbursed the amount of their reasonable costs, expenses and disbursements in the proceedings in bankruptcy, including the sale of the mortgaged property, from the proceeds of such sale. *Ib.* [*Reporter.*

OLCOTT vs. FOND DU LAC COUNTY.

CIRCUIT COURT.—EASTERN DISTRICT OF WISCONSIN.—OCTOBER, 1870.

1. The established rule is that the Federal Courts are to administer the laws of the states in cases where they apply; and the uniform practice has been to consider a judicial interpretation placed upon a statute the same as if incorporated within the language of the statute itself.

2. When the highest judicial tribunal of a state has placed a construction upon a statute of a state, that construction will be adopted by this court.

The Legislature of Wisconsin in 1867 authorized the imposition of a tax upon the property of the county of Fond du Lac, for the purpose of enabling a railroad company to prosecute the construction of a railroad, the money raised by taxation being intended as a donation for that purpose. Under this law certain county orders were issued, bearing date the 15th of December, 1869, which orders constitute the cause of action in the case.

When the county authorities were in the act of carrying into effect the provisions of this law, and before, in fact, the county orders in controversy were issued, an application was made to the State Circuit Court of that county, by one Whitney, for an injunction against the county of Fond du Lac, to restrain them from taking any steps in the execution of the law, on the ground that it was not warranted by the Constitution of the state.

An injunction was issued. Subsequently a motion was made to dissolve the injunction, and it was accordingly dissolved by the state court, and thereupon the orders in controversy were issued and sold, amounting in the aggregate to the sum of thirty thousand dollars. Whitney, however, took an appeal to the Supreme Court of the state from the

order dissolving the injunction, and that court held that the law under which these county orders were issued was unconstitutional, and made the injunction perpetual.

M. H. Carpenter and *Finches, Lynde & Miller*, for plaintiff.

J. M. Gillett and *Sloan & Bennett*, for defendants.

DRUMMOND, J.—The only question in this case is as to the effect of a decision of the Supreme Court of the State of Wisconsin as a rule of construction for this court in the present controversy. In other words, should this court follow the ruling of the state court on the statute?

It has been strongly urged by the counsel for the plaintiff that the Supreme Court of Wisconsin has made decisions inconsistent in principle with that of *Whiting vs. The Sheboygan Railway Company*,[1] the case referred to, and that it is the duty of this court to follow what is claimed to be the general scope and spirit of these decisions rather than the decision in this particular case. The principle declared by the Supreme Court of the United States in the Iowa cases, that where the highest legal authority of a state had settled the law under which instruments bearing the qualities of commercial paper were issued, affirming their validity, and on the faith of such decisions they were taken for value by different persons in the market, and the same authority subsequently decided that they were invalid, that the first ruling would be followed in the courts of the United States, is one which is binding on this court as authority, and the correctness of which cannot be disputed; and if that rule was applicable here it would govern this case. But the only case in which any question has ever arisen before the Supreme Court of Wisconsin upon the validity of this statute is the case just referred to, where this act of the Legislature was declared to be inoperative as being in conflict with the fundamental law of the state.

[1] 25th Wisconsin, 424.

The rule established by the Judiciary Act of 1789, is that the federal courts are to administer the laws of the states in cases where they apply, and the uniform practice has been to consider a judicial interpretation the same as incorporated within the language of the statute itself. And it is obvious that no other rule can be safely observed in our mixed system consistently with the rights of all parties. This court, although a court of the United States, is sitting here to administer the laws of Wisconsin, in cases where they apply, precisely as a court of the state would administer them. It is only in this way that harmony can be preserved between the courts, state and national. Where a state court has adopted more than one construction of a state law it may be competent for the federal court to receive or accept one in preference to the other; but where there is only one construction given by the state court to a law of the state, then it would seem to be disregarding well settled principles for the federal court to decide contrary to the adjudications of the state court. Now, in this case, the plaintiff claims a right under a law of the State of Wisconsin. He has no other standing in court. It is a recent statute. It has become the subject of deliberate examination and adjudication by the Supreme Court of Wisconsin, and it seems to me, under the circumstances of this case, that this court should follow that decision. If it were a hasty or ill-considered judgment, then there might possibly be some reason for disregarding it. But this opinion was given after a full and able argument, and after an argument upon a motion for a rehearing; an additional opinion was given by the Chief Justice, and in these opinions that court considered and determined the effect of the previous decisions of the Supreme Court of the state, which it is claimed were not entirely consistent with this, so that it is the deliberate and well considered judgment of the Supreme Court of the state not only that this statute was unconstitutional, but that there was nothing in any previous decisions of that court to prevent its so deciding. If there is to be any different rule established by the Supreme Court of the United States than the one which we think appli-

cable here, that court must take the responsibility. It has certainly never gone so far as the counsel for the plaintiff desire that this court should go in this case. The instruction of the court, therefore, to the jury will be that inasmuch as the Supreme Court of this state has decided the act under which these county orders were issued to be invalid, that this court must also decide them to be invalid, and that the plaintiff cannot recover.

Miller, J., who sat with Drummond, J., concurred.

This case was carried to the Supreme Court, and reversed by a divided Court; opinion filed March 31st, 1873, which will appear in 15 Wallace.

In the case of *Morgan vs. Curtenius*, 20 Howard, 1, the Supreme Court ruled that when the circuit court adopted the construction of a state statute which was placed upon it by the Supreme Court of the state, the fact that that court subsequently overruled its decision, and placed a contrary construction upon the statute, will not authorize the U. S. Supreme Court to reverse the judgment of the circuit court as having been erroneously given.

That there may be exceptions to the general rule that he courts of the United States will follow the decisions of the state courts on the construction of state laws, and some such exceptions stated, see *Pease vs. Peck*, 18 Howard, 595.

In cases depending upon the statute of a state, especially in those respecting the titles to land, the federal courts will adopt the construction of the state courts, when that construction is settled or can be ascertained. *Loring vs. Marsh et al*, 2 Clifford, 311.

The same rule prevails in suits in equity as at law. *Ib.*

The natural import of the words in the Judiciary Act includes the laws in relation to evidence as well as the laws in relation to property. *Ib.*

The construction given to a state statute of the description mentioned, by the state court, is regarded as a part of the statute, and is as obligatory on the courts of the United States as the text; and if the state court adopts new views as to the construction of such a statute, the federal courts will follow the latest settled adjudication. *Ib.*

The decisions of the state courts, however, cannot be allowed to retroact upon the judgments of the federal courts. The Supreme Court will not reverse its own judgment in a case depending upon the local law, if correctly given at the time in accordance with the settled construction given to the law by the state court, even should it appear that the state court subsequently changed its views and adopted a different construction. *Ib.*

The same is true of the decisions of the circuit courts.

See also *Van Bokelen vs. The Brooklyn City R. R. Co.*, 5 Blatchford, 379; *Blossburg & Corning R. R. Co. vs. Tioga R. R. Co.*, 5 do., 387.

On commercial questions the courts of the United States are not bound by the decisions of the state courts. *Robinson vs. Commonwealth Insurance Co.*, 3 Sumner, 220; *Williams vs. Suffolk Insurance Co.*, Id., 270.

Adopt state statutes of limitation. *Martin vs. Smith*, 1 Dillon, 85; *Brown vs. Hiatt*, Id. 472.

Will follow decisions of state tribunals on all questions dependent upon local laws. *Springer vs. Foster*, 2 Story, 383.

Follow state construction of statute: *Woolsey vs. Dodge*, 6 McLean, 142; *McKeen vs. Delancy's Lessee*, 5 Cranch, 22; *Elmendorf vs. Taylor*, 10 Wheaton, 157; *Stapp vs. Steamboat Swallow*, 1 Bond, 189; *Coolidge vs. Curtis*, Id., 222; *King vs. Wilson*, 1 Dillon, 555; *Meade vs. Beale*, Taney, 339, 359. If these conflict, will follow the latest. *Smith vs. Shriver*, 3 Wallace, Jr., 219.

Are not bound in interpretation of deeds by local adjudications. *Thomas vs. Hatch*, 3 Sumner, 170.

Will not rest its judgment upon construction of statute by a state court if the construction of the statute was not necessary for the decision of that case. *Carroll vs. Carroll's Lessee*, 16 Howard, 275.

The federal courts ordinarily follow the state laws, and regard the decisions of the highest state tribunal upon a state law as conclusive; but in cases depending upon the general usages of commerce or principles of commercial law, they will not be bound by state decisions. *Meade vs. Beale*, Taney, 339. [*Reporter*.

In re STEVENS.

DISTRICT COURT.—WESTERN DISTRICT OF WISCONSIN.[1]—OCTOBER 1870.

IN BANKRUPTCY.

1. EXEMPT PROPERTY.—It is the duty of this Court to see that the property to which a bankrupt is entitled is secured to him, as much as to see that he surrenders the balance to his creditors.

2. LEX DOMICILII.—Property exempt by the laws of the state where the bankrupt resides and where the petition is filed, will be protected, wherever it may be actually situated.

3. LEX REI SITÆ.—At the time of the filing of the petition in Wisconsin, certain property was in the possession of an officer of the State of Illinois, (where by law it was not exempt,) by virtue of a writ of attachment. *Held:*

1st. This court will not consider the laws of Illinois to see whether under them the property is exempt; the rights of the bankrupt and his creditors are to be determined under the Bankrupt Act alone.

2d. ATTACHMENTS—are dissolved without reference to the property upon which they are levied, the object of the act being to stop all proceedings against the bankrupt in any other court, and bring all matters and questions between the bankrupt and his creditors into the bankrupt court for final settlement.

3d. The question whether the property is exempt under the Illinois law is not material.

4. LIEN OF OFFICER FOR FEES.—Officer in possession of the property under the attachment writ cannot retain the property until his fees are paid. The attachment being dissolved, he has no means of enforcing his claim against the property. His only remedy is by application to the court to be paid out of funds in the hands of the assignee.

This was a case of voluntary bankruptcy. The petition was filed on the 30th day of September 1869, and at the request of the bankrupt a provisional assignee of his estate was appointed. A portion of the property at the time

[1] By Act of Congress, June 29, 1870, 16 U. S. Statutes at Large, 171, the State of Wisconsin was divided into the Eastern and Western Districts, and on the 9th day of July, 1870, James C. Hopkins, Esq., of Madison, was appointed Judge for the Western District. [*Reporter.*

(a span of horses, wagon and harness), was in the possession of a constable in Winnebago county, Illinois, under and by virtue of attachments issued against the bankrupt by a justice of the peace of the state of Illinois, in favor of divers creditors of the bankrupt residing in this state. The property thus held was claimed by the bankrupt in his petition as exempt under the bankrupt act. The attaching creditors then moved the court to modify the order appointing the provisional assignee, so as to exempt from the operation thereof the property attached and held in the state of Illinois.

C. A. Parsons, for bankrupt.

S. J. Todd, for creditors.

HOPKINS, J.—The ground of this motion is that by the laws of the state of Illinois the property was not exempt, and that by the attachments the creditors acquired a valid lien upon it as against the bankrupt; and further, that as under the bankrupt act it would be exempt, and would not pass to the assignee, the bankrupt was the only party who could contest the right to the property under the attachment; that the assignee had no right to take possession of it under the act, nor had the other creditors any right or interest in the question, for if released from the attachment it would be exempt under the bankrupt act, and if held, it would be taking property they could not in any way reach. This is an ingenious view of the question, but I think untenable. I think it is as much the duty of the court to protect the rights of the bankrupt as the creditors. If by the act he is entitled to certain exempt property, it is the duty of the court to see that he has it. When a bankrupt surrenders all his property to his creditors, except certain portions which the act exempts for his own use and the use and convenience of his family, it is the duty of the court to see that the portion he is entitled to is secured to him, as much as it is to see that the portion he is required to surrender to his creditors, is surrendered to them.

This court proceeds under the bankrupt law only, and

administers that and has original jurisdiction as to all matters and things to be done under and in virtue of the bankruptcy. One of the things to be done under the act is to assign and set off to the bankrupt the exemptions mentioned in the 14th section. The bankrupt claims under that section this property that is attached, and it is the duty of the court, if it is exempt by that act, to assign it to him as exempt property. No one will deny but that it is exempt by the laws of this state—the domicile of the bankrupt; and being so, it is unquestionably exempt by the 14th section of the bankrupt act.

Now can this court look into the laws of Illinois to see whether it is exempt there or not? What has this court to do with the exemption laws of Illinois? I cannot see that it has anything. It must administer the bankrupt act, and settle and determine the rights of the bankrupt and his creditors under that act alone. If under that act a creditor has a valid lien, or one that it recognizes, then it will be sustained; and if that act does not recognize the lien, then it cannot be sustained. It may be true that but for the bankruptcy proceedings, the attaching creditors could have held the property, and the same may be said of all attachments against bankrupt estates that are dissolved by proceedings in bankruptcy.

After the commencement of proceedings in bankruptcy all proceedings by the creditors in the state courts against the bankrupt are forbidden, and all attachments issued within four months are, by the express terms of the act, declared to be dissolved, without reference to the property upon which they are levied, the object of the act being to stop at once all proceedings against the bankrupt in any other court, and to bring all matters and questions between the bankrupt and his creditors into the bankrupt court for final settlement.

Now, if this is so, how is the question as to whether this was exempt property, material? The creditors' right to prosecute their attachment suits being taken away, and their attachments being dissolved, what claim have they, by virtue of the attachments, to assert?

The District Court for the Eastern District of Missouri, *in re Ellis*, 1 B. R. 154, has given a like construction to the act, and the District Court of South Carolina, *in re Hambright*, 2 Bankrupt Register, 157, holds that the bankrupt is to be regarded as a *purchaser* of his exempt property, the consideration being the surrender of all his other property for the benefit of his creditors.

This view disposes of the motion of the creditors. But they insist that the officer should not be required to give up the property until the fees and charges upon it are paid, and there are some cases to the effect that he is entitled to his fees, but not, I think, that he can refuse to deliver the property until they are paid. For if the attachments by virtue of which he holds the property are dissolved, he has no means of enforcing his lien against the property. He cannot sell it. His remedy, if he has a lien, is to apply to this court to have it allowed and paid out of the assets that may come into the assignee's hands, and this court could, on such an application, make such an order as might appear just and equitable in the premises; but I do not think he can interpose his lien as against the right of the officers of this court to the possession, and withhold the property from them until it is paid.

Motion denied.

It is, however, held in *In re Housberger*, 2 Bankrupt Register, 33, that a sheriff has a lien for his costs on property attached. *Contra*, *In re Preston*, 5 Bankrupt Register, 298, quoting decision by Judge Grier, and that the costs in the attachment made in good faith prior to the commencement of proceedings in bankruptcy may be proved against the estate.

Rule as to costs in attachment proceedings and for care and custody of bankrupt's property before filing of petition. *Gardner vs. Cook*, 7 Bankruptcy Register, 346. [*Reporter*.

UNITED STATES vs. FOSTER.

CIRCUIT COURT.—EASTERN DISTRICT OF WISCONSIN—OCTOBER, TERM, 1870.

RIGHTS OF INDIANS.

1. The Indians on the Oneida reservation have the right to cut and use the timber thereon, and to sell sufficient to support themselves and families.
2. They must be treated as owners of the land, their ownership however being subject to the rights of sovereignty of the United States.
3. The power of the United States to sell this reservation commented upon.

Replevin brought by the United States against the defendant for a quantity of logs which, it is alleged, were cut on the Oneida reservation, near Green Bay, in the State of Wisconsin.

Levi Hubbell, U. S. District Attorney, for the United States.

Smith & Stark, for defendant.

DRUMMOND, J.—The facts of the case seem to be substantially as follows: On the 8th day of February, 1831, the Menomonee tribe of Indians, by articles of agreement made with the United States, which were afterwards ratified by the Senate with a proviso not affecting the question in this case, which thereby became a treaty between that tribe and the United States, ceded a certain tract of land to the United States for the benefit of the New York Indians. That tract included what is now known as the Oneida reservation. It would seem that at that time, the Oneida Indians were in possession of the Oneida reservation, and have continued in possession ever since. On the 4th day of January, 1836, the Oneida nation made a contract of lease to Daniel Bread, one of their tribe, authorizing him to construct a dam and saw-

mill on Duck creek, within the reservation, and to cut all the timber thereon necessary to build the dam and mill, as well as do lumbering thereat. Any one of the nation had a right to cut and draw logs to the mill, and one-half of the boards were to go to the mill, and the other half to him who cut and drew the logs. This condition as to the division of the property was to continue four years, and after that those who drew the logs were to be entitled to two-thirds of the boards. The lease concludes with this stipulation: "And the said Bread and his heirs and assigns shall have privilege to cut all logs necessary to keep the mill constantly running." By the terms of this lease this arrangement was to be perpetual. It appears the dam and mill were constructed by Bread, and that lumber has been manufactured there from that time up to the present, and that the defendant claims under this lease and is now and has been for some time in possession of the mill. On the 3d day of February, 1838, a treaty was made between the first Christian and Orchard parties of Indians, by which they agreed to cede to the United States all their title and interest in the lands set apart for them in the first article of the treaty with the Menomonees, already referred to; but by a second article of the treaty of February 3, 1838, there was reserved to the Indians from the foregoing cession, and to be held as other Indian lands, a tract of land containing one hundred acres for each individual, and it is this that is now called the Oneida reservation; and the Oneidas were a party to this treaty of 1838, by the name of the first Christian party of Indians. It will be seen, therefore, that by the terms of this treaty of 1838 the United States contracted with the Oneidas for the purchase of the land which had been ceded to them by the Menomonees in 1831, and that they reserved by express terms to the Oneida Indians what is now known as the reservation. There seems to be no controversy about these facts, and the Indians have been treated from that time as the owners and possessors of the land. Since the lease was made in 1836 it appears that the Indians have resided upon the land, and have cultivated it to a greater or less extent, and have been in the habit of

cutting and hauling logs to the mill constructed under the lease. It is to be observed that this lease was made under the direct sanction of Mr. Boyd, the Indian agent of the United States at that time, as is manifest from his signature to a memorandum stating that fact, attached to the lease. The lumber has been cut and used in the manner already described, it would seem, with the acquiescence of the federal authorities.

Recently stringent instructions have been given to the superintendent of Indian affairs that no timber shall be cut upon the reservation, except what may be necessary for the personal use of the Indians. It appears by the evidence that about one hundred thousand feet of the lumber in controversy in this case was cut on the reservation by some of the Indians, and sold to the defendant, but it does not distinctly appear who cut or sold the remainder. One of the questions that arises in the case is, whether for the lumber that was cut and sold to the defendant by the Indians themselves, the action of replevin can be maintained by the United States. And I am of the opinion that if it was cut and sold for the purpose of supporting the Indians or their families, the action of replevin cannot be maintained. The Indians were in possession and were the owners of the land, so acknowledged to be by the Government of the United States. It is true they were in possession as other Indians, according to the language of the treaty of 1838; but the understanding seems to be that while the ownership of the Indians could not interfere with the rights of sovereignty on the part of the United States, as a nation, and that the Indians might be compelled to sell the lands to the United States, that for all purposes the Indians must be treated as owners of the land, with the right to use it for all the purposes of tillage; to take fuel, wood for building and fences, and for their ordinary support. If this is so, while, perhaps, there may be some question whether the Indians would have the right to commit waste, properly so called, upon the land, or to use the timber for the purpose of speculation, still there can be no doubt they would have the right to clear the land for cultivation; and, if so, it would seem,

to sell the wood thus obtained from the land; and to say that they could have the right to cut and use the wood and timber for these purposes, and that they could not sell it to enable them to obtain necessary articles, such as nails and other materials for the construction of their buildings and fences, would seem to be making a very refined distinction and one not warranted under the circumstances of the case.

This land is the only means of support which these poor people have. At the time of the treaty of 1831 the tribe consisted of less than six hundred persons. There are now about twelve hundred. The contributions of the Government to these people are comparatively insignificant, furnishing them really no sufficient means of support, and, therefore, they must rely upon the land itself, and what comes from the land; and to insist that in the case of failure of crops, even if it be contended that it is their duty to cultivate the land, they could not take the wood necessary for their support, would be something not warranted by the principles of equity, and certainly ought not to be sanctioned by a court of justice.

I am therefore of the opinion that these Indians had the right to cut this timber on their own land for the purpose of contributing to the support of themselves and families. It is proved that this right has been exercised for many years with the sanction of the Government and with the express consent of the tribe itself in council.

It may be doubted whether this reservation can be sold by the United States in the present condition of the title, even by act of Congress, without the consent of the Indians themselves, but it is certain that it cannot be without an express law; and if the precedents which have always existed in such cases should be followed, it cannot, and ought not to be sold by the Government, until the rights of the Indians are purchased, and with their free consent.

THE MARY MERRITT.

CIRCUIT COURT.—EASTERN DISTRICT OF WISCONSIN.—OCTOBER, 1870.

IN ADMIRALTY.

1. PROVISO IN STATUTE.—If an information sets forth a proper cause of forfeiture within the main part of a statute, the fact that it does not allege that the case is not within the proviso, under which there was an exemption from forfeiture, does not prevent the operation of the statute.

2. MATTER OF DEFENSE.—If the claimant relies upon the exemption under the proviso, he must allege it. That is matter of defense to be set up by him.

3. NATIONALITY OF VESSEL.—A barque built in Canada and owned in the United States is not a vessel of the United States; nor is it a foreign vessel of the character described in the first section of the act of March 1, 1817.

Libel for forfeiture, under the act of March 1st, 1817, against the barque for the reason that there was imported in her into this district, in 1868 and 1869, from Canada, a quantity of goods, wares, and merchandise, the product of Canada, the barque being foreign-built, and at the time of importation, wholly owned by citizens of the United States. The case was disposed of by the District Court upon an exception allowed to the libel that it did not set out that either Canada or Great Britain has adopted a regulation similar to that contained in this Act of Congress. The court below sustained the exception, and dismissed the libel. The only question was, whether this ruling was correct.

The first section of the statute is as follows:

"After the thirtieth day of September, next, no goods, wares, or merchandise, shall be imported into the United States from any foreign port or place, except in vessels of the United States, or in such foreign vessels as truly and wholly belong to the citizens or subjects of that country, of which the goods are the

growth, production, or manufacture; or from which such goods, wares, or merchandise, can only be, or most usually are, first shipped for transportation:

Provided nevertheless, That this regulation shall not extend to the vessels of any foreign nation which has not adopted, and which shall not adopt a similar regulation."[1]

Levi Hubbell, U. S. District Attorney, for the United States.

Norman J. Emmons, for respondent.

DRUMMOND, J.—It is clear that if the information sets forth a proper cause of forfeiture, within the main or principal part of the statute, the fact that it does not allege that the case is not within the proviso will not prevent the operation of the statute. That is a matter of defense to be set up by the claimant. If he relies upon the proviso as exempting him from the operation of the main cause of forfeiture set forth in the statute, he must allege it. The construction which I place upon this statute of 1817, is that it applies in either contingency to vessels of the United States, or of foreign nations having a national character. I do not understand that the barque Mary Merritt is a vessel of the United States. It was built in Canada, and is owned by citizens of the United States. It is a settled rule that in all cases in order to give vessels a national character as vessels of the United States, and entitle them to registry, they must be built in this country. Some question has been made whether the barque Mary Merritt was not a British vessel, and various acts of Parliament have been cited upon that point; but so far as I can understand the application of these various laws to this case, it cannot be considered the vessel of any foreign nation, built as it was, in Canada, and owned here. It follows, therefore, from what has been said, that the exception made to the libel should have been overruled by the District Court, and therefore, the order dismissing the libel will be reversed, and the defendant have leave to withdraw his exception and answer the libel.

[1] 3 U. S. Statutes at Large, 351.

It is not necessary in a libel to anticipate and deny a matter of defense. *Cargo of the Brig Aurora vs. United States*, 7 Cranch, 382.

In this case, which was a libel of goods under the non-intercourse acts, objection was made to the libel on the ground that it did not negative the American property in the goods; but the court held that this would constitute ground of defense, and in no case would it be necessary to state such defense or exception. [*Reporter*.

In re KAHLEY

DISTRICT COURT.—WESTERN DISTRICT OF WISCONSIN.—NOVEMBER TERM, 1870.

IN BANKRUPTCY.

1. A mortgage given by partners upon partnership property to secure an individual debt of one of the partners is valid. The rule preferring partnership property to the payment of partnership debts is for the benefit of the partners, and they may waive it. Such a mortgage is a waiver.

2. MORTGAGE ON RETAIL STOCK.—A mortgage upon a stock of goods, authorizing the mortgagor to sell and replace them in such manner as he may determine, and use the proceeds as he sees fit, is void as to such goods as the power of sale relates to

3. POWER TO SELL—HOW PROVED—AVOIDS MORTGAGE.—If such power of sale is inserted in the mortgage, it is proved by the production of the mortgage, and the mortgage would be held void by the court. If not, it may be proved by parol, or inferred from circumstances and the conduct of the parties, and then it would become the duty of the court to instruct the jury that such power of sale by consent or understanding avoids the mortgage.

4. CREDITORS MAY ELECT.—The creditors have their election to ratify the sale and collect any balance due, or avoid it, and take the goods.

5. VOID SALE TO CREDITOR.—The sale of a stock of goods with the fixtures to a creditor, he giving his notes for the balance above his claim, and

being aware that their debts greatly exceeded their assets, is not made in the usual and ordinary course of business, and is void under the 35th section of the Bankrupt Act.

6. RESTORED TO RIGHTS AS MORTGAGEE.—The title of the purchaser thus failing under the proceedings in bankruptcy, his purchase does not impair his rights as mortgagee, but he should be restored to his rights as such, as they existed at the time of his purchase.

7. MORTGAGE ON STOCK ETC.—HOW FAR VALID.—A mortgage covering fixtures, a stock of goods on hand kept for sale, and all such as should afterwards be purchased and put into the store, may be valid as to the fixtures, but void as to the goods.

8. COURT MAY ORDER SALE FREE FROM LIEN.—By virtue of sections 1 and 20 of the Bankrupt Act the court has the right to take possession of and sell mortgaged property, free from the lien without first satisfying it, but in such case the lien is transferred to the funds in court.

9. This is a matter of discretion; and if the mortgaged property is of less value than the debt, or if of no marketable value, and there is no question as to the validity of the lien, it should be delivered to the creditor.

This was an involuntary petition in bankruptcy filed against Joseph Kahley and others, partners doing business in Janesville, Wisconsin.

The proceedings were commenced on the 20th of October, 1870, and the customary warrant issued to take possession of the bankrupts' property. The marshal, on the 21st, seized by virtue of his warrant a stock of goods consisting of toys, candies and cigars. and the fixtures in the store or salesroom used for the business. The bankrupts had been for about a year previous thereto engaged in selling and dealing in that class of goods. In February, 1870 the bankrupts gave to Daniel G. Ilgen their notes, one for $475, which was for the balance of the purchase price of the interest of said Ilgen in said business sold to Kahley, and the other for $500, being for balance due to Ilgen from Manning for money put into the business for Manning; and to secure the notes they gave a chattel mortgage upon the stock of goods on hand, and such as might afterwards be purchased and put into the store, and also upon the fixtures. One note became due October 12, 1870, and was not paid. Ilgen then purchased the whole of the stock and fixtures at $600 over and above his

mortgage, and gave them two notes of $300 each, one payable to each, and gave up his notes against them secured by his mortgage, and went into possession as such purchaser. At this time Ilgen knew that their debts greatly exceeded their assets.

Ilgen, then, on these facts, applied to the court for an order that the property be restored to him.

Tenney, McClellan & Tenney, for creditors.

Conger & Sloan, for mortgagee.

HOPKINS, J.—A great many questions have been raised and discussed by the respective counsel on the argument. Those that I regard as decisive of the case I will proceed to dispose of. The creditors insist that the mortgage is void as against the partnership creditors, because the notes or the debts which it was in fact given to secure, were individual debts of the respective partners, and not properly a partnership demand.

I think the mortgage is good as against the partnership property.[1]

The rule that prefers partnership property to the payment of partnership debts is for the benefit of the partners, and they may waive it, which I think they did in this case, by giving their notes and mortgage upon the partnership property to secure them, notwithstanding the debts for which the notes were given were the individual debts of the bankrupts.

The sale of the property by the bankrupts to Ilgen on the 13th or 14th of October, was not made in the usual and ordinary course of business of the bankrupts, and is therefore *prima facie* evidence of fraud under section 35 of the bankrupt act. It may also have been fraudulent by the common law, and the fact that a jury so found, and the ready acquiescence of both parties in such finding, and their attempting to change their condition immediately thereafter, is very strong evidence that they understood that it was; and if I were to decide the case upon the evidence, as to the *bona fides* of that

[1] *Kirly vs. Schoonmaker*, 3 Barbour's Chancery Reports, 46.

sale, I think I should have to hold it fraudulent and void as to the creditors, without reference to the bankrupt act. But as I consider it a sale out of the "ordinary course of business," and as Ilgen must have had good reason to believe that they were insolvent at the time, I think it is clearly void under the bankrupt act.

But notwithstanding the sale was void, and Ilgen not entitled to the property under it as against the creditors, still I think he has a right to assert his lien by virtue of his mortgage so far as that is valid. I do not think his purchase, which the creditors have a right to avoid, impairs his rights under his mortgage. But on the title failing that he supposed he got by the purchase, I think he would be restored to his rights as mortgagee, as they existed when he attempted to purchase. His title under the purchase he would lose, but nothing more.

The creditors would not be placed, by reason of the attempted purchase, in any better condition than they were before, nor he in any worse. It is like a case where usury is interposed to a note given in renewal of a valid, existing debt. If the new security is declared void for usury, the plaintiff's right to recover on the original indebtedness is revived.[1]

I now come to the consideration of the more important question—what property is bound by the Ilgen mortgage? It is certainly invalid as to the after-acquired property.[2]

But it is claimed to be valid as to the fixtures, and as to such portions of the stock as remain, and can be identified as being on hand when it was given.

There is no doubt but that it may be inoperative as to part, and binding as to the residue. Therefore, as to the fixtures which have not been changed, I think it is good. But as to such portions of the stock as may not have been sold, and can be identified, I think, according to the weight of authority, it cannot be sustained.

[1] *Eastman vs. Porter*, 14 Wisconsin, 39; *Meshke vs. Van Dorn*, 16 do., 319, and cases there cited.

[2] *Chynoweth vs. Tenney*, 10 Wisconsin, 397; *Single vs. Phelps*, 20 Wisconsin, 398; *Gardner vs. McEwen*, 19 New York, p. 123.

The mortgage was upon a stock that was kept for sale, and unquestionably both parties expected that it would be sold. The mortgagors were engaged in selling that class of goods as a business. They bought them to sell, and intended and expected to sell them. So that I must presume that it was understood and expected by both parties that the mortgagors would sell the stock then on hand, and put in more from time to time as they might be able or wish to do, and as they in fact did. And which view is strengthened and made almost conclusive by the clause in the mortgage relating to after-acquired goods. That being the case, I think the mortgage of the whole stock that might be sold by the mortgagors is vitiated as to creditors.

The Supreme Court of Illinois, in *Barnet vs. Fergus et al*, reported in 51 Illinois, 352, have decided a mortgage under such circumstances to be void; in which decision I fully concur. If there had been a clause in the mortgage giving the mortgagors the right to sell the stock and use the money as they might choose, it would have rendered the mortgage void in law as to the whole stock.[1]

To sustain a mortgage accompanied by such an agreement, consent or understanding, would allow a mortgagor to sell the mortgaged property as he saw fit, use the proceeds for his own benefit, exercise all the control, and enjoy all the advantages of an absolute owner, in defiance of his creditors. A mortgage accompanied by such an agreement or consent is no protection to the mortgagee. Such an arrangement defeats its essential nature and quality as a mortgage, so that it cannot in a legal sense be called a security. It is nothing more than the expression of a confidence by the mortgagee in the mortgagor.

To permit a debtor to guard his property against his other creditors by such a mortgage, would enable him to hinder and delay them as long as he and his confidential mortgagee might

[1] *Place vs. Langworthy*, 13 Wisconsin, 629; *Gardner vs. McEwen*, 19 New York, 123; *Collins vs. Myers*, 16 Ohio, 547; *Jordan vs. Turner*, 3 Blackford, 309; *Edgell vs. Hart*, 5 Selden, 213.

see fit. I am fully satisfied that a mortgage upon a stock of goods which authorizes the mortgagor to sell them and replace with others at such times and in such manner as he may determine, and use the proceeds generally as he saw fit, is void as to such goods as the power of sale relates to.

Then the question arises, how may it be proven.

If it is inserted in the mortgage, it is proven by the production of the mortgage; but if it is not, it may be proven by evidence *aliunde*. It is not necessary that it should be in writing or in the mortgage. It may be proven by parol, or inferred from circumstances and the conduct of the parties. It must of course be established by legal and competent evidence, and when thus established it is fatal to the security. If it appeared upon the face of the mortgage, it would be held void by the court; 13 Wisconsin, 629, *supra*. But if not there, and it appeared by evidence *aliunde*, it would be the duty of the court to instruct the jury that such consent or understanding would avoid the mortgage.

And as I think the testimony shows that it was understood between Ilgen and the mortgagors that they might continue to keep possession of and sell the stock of goods after the mortgage was given, and use the proceeds at their discretion in buying other stock, the mortgage is void as to the whole stock, and only good as to the fixtures.

It appears that after Ilgen had been in possession a short time, and after his purchase had by a jury in a justice court been decided to be void as against creditors, they attempted to trade back. But such re-transfer was after the commencement of these proceedings, and when the marshal entered to take possession it was not wholly completed. Ilgen did not then claim to own the goods, but asserted his lien as mortgagee.

I think the creditors may, therefore, either ratify the sale, and collect of Ilgen the $600 he agreed to pay; or treat it as void, and take the goods. The goods were taken by the marshal, and afterwards delivered to a provisional assignee appointed at the request of the counsel of Ilgen.

The counsel of Ilgen on this motion argues with much earnestness that this court had no right to take possession of the mortgaged property after a default in payment, and sell it without first paying off the mortgage; particularly in this case, as he claimed the mortgagee was in possession when these proceedings were commenced.

Under sections 1 and 20 of the bankrupt act I have no doubt that this court has the right through its officers to take possession of and sell mortgaged property free from the lien of the mortgage, without first satisfying the lien.[1] In which case the lien is transferred to the fund in court. It is a matter of discretion with this court to sell subject to, or free from the lien or incumbrance.

But this discretion should be exercised with due care and regard for the interest of the secured creditor, as well as the general creditors. And if the property was of less value than the debt, or had no marketable value, and there was no question as to the validity of the lien, it should be delivered to the secured creditor instead of being sold. And in this case I should have ordered the fixtures delivered to Ilgen were it not that the creditors question the validity of his mortgage.

I understood the counsel of Ilgen to intimate that Ilgen would now take the property and pay the $600, and I understood the counsel for the creditors to say that if I should hold the mortgage as valid on the fixtures that the creditors would prefer to accept the $600 instead of the goods. I shall therefore deny this motion of Ilgen for the property.

And I shall order that if he pay into the registry of the court $600, and pay the fees and expenses of the provisional assignee within ten days, that the whole stock and fixtures be delivered to him; and shall order that Manning deposit in this court the note given him by Ilgen for $300 for his share of the stock.

I have charged Ilgen with the expenses of the provisional assignee, as he was appointed at his request. And if Ilgen

[1] *Houston vs. the Bank of N. O.*, 6 Howard, 486; *Foster et al vs. Ames*, 2 Bankrupt Register, 147; *Ex parte Christy*, 3 Howard, 308.

does not comply with the above terms, the assignee shall then proceed to sell the goods and fixtures—selling them separately, and pay the proceeds into this court, stating the amount for which he sold each separately.

Consult *in re Eldridge*, *ante* p. 362, and *Harvey, assignee, etc., vs. Crane*, March, 1871, *post p.* 406, and cases there referred to.—[*Reporter.*

BILL vs. THE NEW ALBANY, &c., RAILWAY COMPANY.

CIRCUIT COURT.—DISTRICT OF INDIANA.—NOVEMBER TERM, 1870.

IN EQUITY.

FORECLOSURE AGAINST RAILROAD COMPANY.

1. Where a bill had been filed in this Court to foreclose a mortgage given by a railroad company, various interlocutory orders entered, a trustee appointed who had taken possession of the road, and on the faith of these orders, certain bonds had been surrendered, stocks taken, and debts and liabilities incurred, this is the proper tribunal to decide the rights and equities of the parties in interest.

2. TRUSTEE SHOULD REPORT TO THIS COURT—and any of the parties have the right to insist upon such report. He has no right to turn over to another jurisdiction matters which had been partially adjudicated here, and this is the only court whose decision upon the rights involved here is binding on the parties.

3. When a party in interest in such case asks for relief, it is no answer to say that another jurisdiction has attempted to seize the property, and thus place it beyond the power of this Court to give relief.

4. INTERFERENCE BY STATE COURT.—Where during the pendency of the suit in this Court, the trustee acting with certain bondholders, but without

notice to or permission from this Court, filed a bill in the state court to foreclose the same mortgages which are the subject of this bill, and making no reference to the case in this Court, upon which a receiver was appointed, foreclosure ordered, and sale made by the Sheriff, who under order of the court delivered the road to the purchasers; such an interference on the part of the state court with property at the time within the jurisdiction of this Court was unauthorized, and it is nevertheless within the control of this court, to adjudicate upon the equitable rights of all who have ever been before it.

5. A bondholder and stockholder is entitled, in such a case, to the equitable interposition of this court to protect his rights under its decrees and to demand an account from the trustee or his representatives.

6. The purchasers and their counsel having had notice of what had occurred in this Court cannot claim to be *bona fide* purchasers.

7. RECEIVER—WHEN APPOINTED.—The Company being insolvent, the original trustee having died without rendering a proper account to this Court, and the road being in the actual possession of parties acting in hostility to its decrees, a receiver should be appointed.

This was a petition for an accounting and the appointment of a receiver, filed under decrees in this case rendered in June and December, 1858, by John Savage Shaw, a bondholder as well as a stockholder of the road, for himself and all others similarly situated in relation to the property.

Williamson was the trustee in five mortgages given by the railroad company in 1851, 1852, 1853, 1855 and 1856, for more than $5,000,000, on all of which interest was due on the first of August, 1857. As by the terms of the mortgages they were liable to foreclosure for non-payment of interest, on that day the trustee filed a bill to foreclose the same in this court, and asking for the appointment of a receiver. On the second of November, 1857, the motion for a receiver was denied, with leave to renew the same upon any new statement of facts; but the company was required on the first of January, 1858, to make a report of the gross and net earnings of the road, and one-half of the net earnings was to be set aside for the payment of the interest of the bonded debt of the company, and the other half for the payment of its floating debt.[1] On the 8th of December, 1857, the court, acting upon the principle that the road was within its control, enjoined the collection of

[1] For opinion then rendered see Volume 1 of this Series, p. 198.

certain executions on judgments obtained in the courts of the state. On the 23d of June, 1858, Mr. Williamson, the trustee, filed a petition in the nature of a supplemental bill, alleging that a basis of settlement had been agreed on between the company and three-fourths in value of all the holders of bonds issued. Some of the stipulations of the settlement were that the time of payment of a portion of the bonds was to be extended; certain of the bonds, in a contingency named, were to be converted into stock; certain holders of stock might surrender the same and receive a per centage of the new stock, and a new organization of the company was provided for. The supplemental bill stated that it was for the interest of all parties that the agreement should be carried out, and asked that it should be ratified and confirmed by the court. The trustee also requested that he might have the right to borrow two hundred thousand dollars on the security of the road in order to pay some pressing claims, and that the possession of the road might be given him. Accordingly, on the 23d of June, 1858, a decree was rendered ratifying and confirming the basis of settlement as set forth by the trustee, and also enjoining certain parties from proceeding under executions against the company issued from the courts of the state. All stockholders and bondholders who had not subscribed to the agreement, were to have ninety days to come in and avail themselves of the benefits of the decree. The road and its fixtures and appurtenances were ordered to be delivered to the trustee until certain sums of money were paid, and whenever they were repaid in full, the trustee was to surrender at their request in writing to the directors of the company, the road and its appendages. In the meantime the road was to be operated by such directors, officers, agents and employes as the trustee should deem best. All questions touching the payment of costs and the expenses of the trustee were reserved by the court for further consideration. This is called in the record an interlocutory decree.

On the 16th of December, 1858, what is termed a final decree was entered, determining the interests under the mortgages and in the capital stock The road was, on

certain conditions, surrendered to the holders of the second and third mortgages, and income bonds, and they were declared to be tenants in common of the road in named proportions; but this was to be subject to certain other mortgages mentioned, the lien of which was to remain valid, and save the incumbrances and claims specifically provided for in the decree, they were to be invested with the whole property. The decree also declared how the net earnings of the road, after the first day of May, 1859, were to be appropriated, and it gave the holders of certain bonds of the capital stock the right to surrender the same and receive an interest in the road; and they were prohibited from enforcing their claims in any other way. This decree was in terms made subject to that of June, 1858, and both were entered with the consent and acquiescence of all the parties in court — complainant, defendant, stock and bondholders.

The order made on the 2d of November, 1857, as to the reports of the earnings of the road, was complied with until changed by the subsequent order of the court as heretofore stated.

On the 28th of May, 1859, the trustee, by supplemental bill, asked and obtained from the court an order restraining certain judgment creditors from interfering with the property of the road, and the trustee and his successors and the holders of the bonds, in conformity with the previous orders of the court, were adjudged to have and enjoy the possession of the property surrendered. Various unimportant orders were made and the cause regularly continued to November Term, 1861, when the trustee filed a supplemental bill, in which he referred to the decrees rendered by the court, and stated that the action was still pending, and that no final decree for sale had ever been rendered. He also declared that the company had changed its name, and was then known as the Louisville, New Albany and Chicago Railroad Company. The trustee submitted to the court the question whether such property should be sold, as was necessary to pay certain indebtedness, or whether the road should be sold as an entirety, and then the surplus be divided between the holders

of bonds and mortgages according to their respective priorities. On the 17th of December, 1861, the court made an order referring to the supplemental bill, as one praying for a decree, that the railroad and appurtenances should be sold under a foreclosure of the mortgage mentioned in the same, that notice be given by publication to all persons interested to show cause at the next term why the prayer of the bill should not be granted. The order provided that the clerk should make publication unless the trustee should direct otherwise, and the evidence is that the trustee did so direct, and accordingly no publication was ever made. Nothing further appears on the record, except some orders about the payment of counsel fees, and the usual order of continuance until the November Term, 1865, when the trustee filed a petition for the sale of certain property not used in operating the road, and also for the sale of the Gosport branch; and the court, on the 8th of December, 1865, authorized the trustee to make the sale. The cause was then regularly continued until the May Term, 1869, when the trustee on the 6th day of July made a report that on the 15th of August, 1867, he had sold the property as authorized by the court.

Before this report was made, and during the spring of 1868, Henry H. Horner, a bondholder under one of the mortgages, filed a bill to foreclose the same in the Court of Common Pleas of White county, in this state, which afterwards was removed by change of venue to Tippecanoe county. To this bill an answer was filed, alleging the pendency of the case in this court as a reason why the state court should not take jurisdiction of the cause. But that court held that as Horner had not become a party to the agreement on which the decree was rendered in this court, he was not bound by it. The state court announced its readiness to appoint a receiver of the road, but on the 20th of September, Horner, without any further action of the court, dismissed his bill. The counsel and parties who defended the suit of Horner, acquiesced in the opinion of the state court, and did not come to this court to request action in the subject matter of the controversy.

During all this time, from the date of the decrees rendered in

this court, Williamson remained in possession of and operating the road, but up to September, 1868, had filed no reports, and had asked for no further action of this court than as heretofore stated.

On the 4th of September, 1866, Williamson, without notice to or permission from this court, filed a bill in the court of Common Pleas of White county in this state, to foreclose the same mortgages which were the subject of the bill filed in this court in August, 1857. He, as trustee, did this, as it was said, on demand of the bondholders, many of whom had been parties to the agreement ratified by the decree in June, 1858. The bill did not refer in any way to the case in this court, but stated that in 1859 the name of the company had been changed under the authority of law to the Louisville, New Albany and Chicago Railroad Company, and that the company had not held an election for directors, nor had there been a meeting of directors for eight years. On the 22d of September, 1868, the court of Common Pleas, on motion of the plaintiff, appointed a receiver of the road, and authorized him to take possession, and the receiver did accordingly, on the first of October, take possession of the road. The company was defaulted, and on the 25th of January, 1869, a final decree of foreclosure was entered, and an order for the sale of the road and its appurtenances made, being the entire road from New Albany to Michigan City. On the 8th of April, 1869, the sheriff of White county in obedience to an order to that effect from the court, sold the road to certain parties, eight and ten per cent. bondholders, for the sum of $100,000, though they state that their agent was authorized to bid not exceeding two millions of dollars, nearly the whole of the $100,000 being paid by *pro rata* credit on the bonds held by the bidders. Objections were made to the sale on various grounds, but they were all overruled by the court, and the sale confirmed, and the sheriff ordered to make a deed, which was accordingly executed to the purchasers on the 26th of May, 1869, which deed was afterwards approved by the court, and ordered to be delivered to the purchasers, and the receiver was required to deliver up to them possession of the

property. Under this decree the purchasers took possession, and have been since the 21st of June, 1869, operating the road under the name of the Louisville, New Albany & Chicago Railway Company, and it was said have converted their bonds into stock, or have surrendered the greater part of the eight and ten per cent. bonds to the Court of Common Pleas of White county.

In August, 1869, Williamson died, and under the mortgages, Bill, the present complainant, was the alternate trustee. On the 10th of November, on motion of Shaw, who had leave to file a petition showing his right to the equitable interposition of the court, the alternate trustee was required to appear at the next term, and cause himself to be substituted as complainant; Bill then moved to dismiss the cause, and the motion to dismiss and the motion of the petitioner to be heard on his equities were fully argued before the court, (Davis, J. at that time alone holding the court), and on the 4th of June, 1870, the court overruled the motion to dismiss, and gave Shaw, the petitioner, leave to file any further pleadings, in conformity with the equity practice of the court, requisite to determine his rights. Under this leave, Shaw presented a petition alleging that he is a bondholder under the mortgage of 1855; that he is the owner of one thousand and ninety shares of the capital stock of the company, issued in lieu of bonds which, with the interest warrants attached, were surrendered to the company under the agreement embodied in the decree of December, 1858; that under the decree of June, 1858, the company on the 6th of October, 1858, executed to Williamson an instrument in writing confirming to him and his successors the powers intended to be vested by the decree; that the trustee still having possession of the property, delivered the same in October, 1868 to James F. Joy, (the receiver appointed by the Court of Common Pleas of White county) without any authority from this court, but at the instance of a majority of the holders of the bonds then outstanding, who continued in possession of the same till it was passed over to certain parties in June, 1869. (the bondholders and purchasers under the decree of the Court

of Common Pleas of White county) at whose instance, among others, the bill was filed in this case, in August, 1857; that a large portion of the bonds secured by mortgage of 1853, of 1855, and of 1856, with the interest warrants, were surrendered, and were converted under the decree of this court into the stock of the company; that a part of the earnings have not been accounted for, and of those he had no knowledge until the affidavits were filed in June last in this application; that Williamson, the trustee, was managed by certain of the bondholders so as to act in their interest alone; that these parties had denied the rights of the petitioner and those like him to share in or interfere in the management of the property; that since they have had control of the road, there have been large earnings of which they have made no report to this court, nor to any one not connected with the usurpation; that he had no knowledge of these acts until the parties had possession of the road; that Bill, the alternate trustee, was in collusion with those parties; that an account should be taken of the earnings of the road from the time it was placed in the hands of Williamson and of the amount of bonds outstanding, and converted into stock, and of the indebtedness and assets of the company; and that a receiver should be appointed.

J. McDonald and *Mr. Hughes*, for petitioner.

Hendricks, Hord & Hendricks, and *Henry Crawford*, for defendants.

Drummond, J.—This court, in June last, decided that Bill could not, on his mere motion, dismiss the suit, to the prejudice of the parties interested in the trust, and that Shaw, as bondholder and stockholder, claiming rights under the decrees of this court, was entitled to be himself heard in support of those rights. And, in a certain sense, the questions now remaining are, whether he has made out in his petition a case for the equitable interposition of the court; and, what relief, if any, the court can give to him and others standing in like relation to the property.

The bill filed in this court was for a foreclosure of the mortgage and a sale of the property, because of the non payment of the interest. For all purposes contemplated by the bill, originally, the trustee properly represented the parties interested in the mortgages, and if the case had gone on in the ordinary way no other parties than the trustee and the company would have been brought in. But after the case had been some time pending, a compromise agreement was made, which was afterwards ratified by the court in the form of a decree. It may be conceded, though the decree of December, 1858, seems to have been drafted on a different hypothesis, as one of the terms of the decree in June was that bonds should be turned into stock, that even the order of the court could not make that effectual without the consent of the bondholders. That would be changing the contract without their assent. The decrees were taken by consent, and on the presumption that all would unite, as nearly all did. But, however this may be, it is certain that by the decrees of this court great changes had been made, with their acquiescence, in the original rights of many of the bond and stockholders. On the faith of the decrees, bonds had been surrendered and stock taken, debts and liabilities had been incurred, and the property pledged to secure them. It had been placed in the hands of a trustee to carry out the orders of the court. It is true the decrees had undertaken to go too far, that is, to order certain things to be done depending upon conditions which might never be complied with, a very common error made by counsel when drafting uncontested decrees to which the attention of the court is not particularly called. In point of fact in this case, if the claims referred to in the decrees were paid in 1864, and by their terms the property could be surrendered by the trustee, there seem to have been no directors of the company to whom to surrender it. They had ceased to exist, the entire control and management of the road being then in the hands of Williamson. Although it is said he kept possession of the road at the request of the bondholders, yet no formal act appears to have been done. There can be no doubt it was the

imperative duty of the trustee to report the facts to this court, and ask for its direction. And, notwithstanding the opinion of the state court on this point, it is equally clear that, under the circumstances of the case, if any bondholder under the mortgage, who had not become a party to the agreement in this court, wished for a foreclosure of the mortgage, or any relief, this was the proper forum to approach for that purpose. The rights of the parties were adjudicated here. The property, for certain purposes, was here. It was not possible that the cause could be divided into fragments, and, in the actual state of affairs, one party in interest go to one court, and another to a different court, for the enforcement of his equitable rights. If the understanding of the parties and the terms of the decree were entirely carried out, there would be no difficulty; but if in that way their expectations were not realized, and there should be a failure to satisfy the claims of the creditors, there would seem to be no question that this court was the proper tribunal to do equity, because it was only by control over the orders of the court, already made, that this could be accomplished. The decree did not require the trustee to report his acts and doings to this court, but the implication is strong that he should have so done. The interests of the company, as well as of the bondholders and creditors represented in the compromise agreement and decree, very much depended upon the management of the road by the trustee. It was their right to know through this court whether the trustee had fulfilled the duties of his trust. The evidence shows that he misappropriated the funds of the road. If Williamson were living, can there be a doubt that any party to the decree of this court would have the right to insist that he should report his doings as trustee to this court?

It would be impracticable for the court to adjust the equities of the parties without knowing the manner in which the duties of the trust had been performed, if it became necessary to act on an application. For example, how can the court settle the equities of Shaw without knowing what has been done by his trustee? And certainly the Court of Common Pleas

of White county could not enter a proper decree without the same knowledge. Williamson had been in possession operating the road for ten years. The rights of all parties were seriously affected by the disposition he made of the earnings of the road during that time, and by the manner in which he performed the duties of his trust. Any adjudication of the rights of the parties under these five mortgages, without regard to what had been done in this court, would necessarily be imperfect, and therefore inequitable, and for the simple reason that interests had been acquired here which could not be changed or modified elsewhere without the consent of the parties. In any controversy thereafter it was not possible to treat the decrees of this court as though they had never been made. That is what the Court of Common Pleas of White county seems, in one sense, to have done. In fact, nowhere in the bill or in the decree in that court is there any intimation of the decrees of this court.

Then as to the action of Williamson, the trustee: He had never fully reported to this court what he had done as to the expenses and earnings of the road, or as to the road itself—whether he still held it or had turned it over to the bondholders. In November, 1861, he stated in a supplemental bill that the action was still pending in this court, and that no final decree of sale had ever been rendered, and submitted to the court, among other things, the question whether the whole road should be sold, and the court made a rule to show cause why this should not be done, on which rule there was no action. In 1865 he applied for an order to sell the Gosport branch, which was granted. Under these circumstances, if a sale of the road was desired either by the trustee or those bondholders who were connected with the decree of this court by appearance here, it would seem that application should be made to the same court for the sale of the property. It could hardly be said then to be fair dealing, while the case was thus proceeding here, for the trustee and some of the bondholders to turn over to another jurisdiction rights which had been partially adjudicated, thus ignoring everything that occurred

here. It is true that they seem to have had the opinion of a state court to justify their action, but as this court was the one in which the controversy was originally commenced, and in which, for certain purposes, it was yet pending, it is the only tribunal whose decision was binding upon the parties in this court. Before he adopted so grave a measure, therefore, and one calculated so much to complicate and embarrass matters in dispute, he should have come to this court for directions and relief. One litigation should have been disposed of before another on the same subject-matter was begun. The fact appears to be that the trustee and the first bondholders thought that the last bondholders had ceased to have any interest in the road, because of the inadequacy of the property to respond to inferior liens, and acted accordingly—a conclusion which could only be reached under the authority of this court. Inasmuch, therefore, as the case was still here, as for certain purposes the property was subject to the control of the court, in the interests of the parties before it, to appeal to another court to foreclose the mortgages and sell the road was unwarranted, and not consistent with the obligations due to all. The trustee was responsible just as much to others as he was to those who demanded he should foreclose, and whose instructions he obeyed. If, then, it was a breach of duty for Williamson to proceed in the Court of Common Pleas of White county, as I think it was, what is the effect upon the right of this court to retain jurisdiction of the cause and of the subject-matter? There can be no doubt it has created great confusion in the position of those claiming under the mortgages, and embarrassment in the court to deal properly with their interests. It has thus brought about an apparent conflict between courts, state and federal, which should always be avoided. But the conflict arises from acts done after this court had obtained jurisdiction of the cause, and for which, therefore, it cannot be justly held accountable, and when a party affected by an order or decree entered in a pending cause asks for relief, it is no answer to say that another jurisdiction has attempted to

seize the property, and thus place it beyond the power of the court to give relief. The question always must be, is it competent for the court to act? If so, its duty is plain, and it necessarily follows from what has been said that, in my opinion, the property is still within the control of this court to adjudicate upon the equitable rights of all who have ever been before it. It is said that those interested delayed in making application to call on the trustee to account. But he was a trustee, who could not, therefore, complain of laches. And, besides, they had the right to presume that the trustee would protect their interests, acting under the sanction of the court. It may not be out of place to refer to the practical result of the wrongful act of the trustee, though if on any other ground it could stand, it might not be material. At the sale under the decree of the Court of Common Pleas of White county, the entire road from New Albany to Michigan City, 288 miles, a property worth some millions, was purchased by seven persons, some of whom say they were acting for bondholders, for the sum of $100,000. If that purchase is unassailable, then these seven bondholders, or those they represent, acquired it absolutely, and any other creditor is without remedy. If they have allowed other bondholders, not connected with them, to convert their bonds into stock, that was a matter of favor and not of right. In April, 1869, the property was sold, and in November of the same year the petioner made his application to this court. It has been said that admitting the decree of the state court was rendered without reference to authority of this court, yet that a just result was reached. The answer is—even if that might change the aspect of the case—this court cannot know that to be so. The data on which to arrive at a true result is not before it, and cannot be until it is made acquainted in a proper way with what the trustee has done.

It is a necessary conclusion from what has been said, that the petitioner is entitled to the equitable interposition of the court, to protect his rights under its decrees, and to demand an account from those who represent the former trustee.

The thirty-eight miles of road from Michigan City to the

east line of Illinois has been operated by the Michigan Central Railroad, a corporation of the State of Michigan, which constructed, it is said, at its own expense, that portion of the road, under a contract made with the New Albany and Salem Railroad Company in 1851. No part of the earnings of that section has ever been accounted for to the defendant or to its successors. And though that line was not included in any of the mortgages, yet there can be no doubt that as the defendant is insolvent the creditors of the defendant may be entitled under certain circumstances to an account of the earnings, expenses and cost of the construction of that part of the road; but as to that part no order will be made.

Whether a receiver should be appointed, is a question often attended with difficulty, and to answer it properly is one of the most embarrassing duties a court of chancery has to perform. The difficulty is increased by the peculiar situation of the property in this case, claimed under a decree of a state court, but it would seem to follow, if the principles heretofore stated are sound, that this court has not lost control of the subject matter of the suit, and that the interference of the state court in dealing with and disposing of property at the time within the jurisdiction of this court, was unauthorized. The only inquiry, therefore, is whether there is any necessity for the appointment of a receiver while the court is settling the rights of the parties. The company is insolvent, the former trustee is dead, having made no reports to this court of the manner in which he performed his trust ; the present trustee caused himself to be made a party to the litigation in the state court. After the death of Williamson he sought to dismiss the proceedings in this court. The parties at present in possession of the road are acting in hostility to the decrees of this court, and the interests thereby adjudicated. It would appear to be impossible to give any relief to the petitioner and others in similar relations, unless the court shall take control and possession of the property.

The parties now in possession can hardly claim to be *bona fide* purchasers, without notice, for they and their counsel had

knowledge of what had occurred in this court. The road seems to have been operated by Williamson at first in the name of the defendant, and then as the Louisville, New Albany and Chicago Railway Co., and since the sale and organization under the decree of the state court the present possessors have called it the Louisville, New Albany and Chicago Railway Company, keeping the name and business distinct in each case.

Very possibly difficult questions may arise out of the sale under the decree of the state court, where the interests of third parties may be affected, but it is to be hoped rights may be adjusted so as to give proper protection to all who ought to have it.

It is claimed that those who are now in possession of the road have not been made parties to this proceeding, and have not been impleaded so that they could answer. Due notice has been given of this motion to the trustee and to the superintendent of the present company, which professes to represent those who purchased under the decree of the state court. The application has been pending since November, 1869. The purchasers themselves have filed an affidavit in court, and there can be no question but all parties have had ample opportunity to be heard. The motion of the petitioner has been fully and ably argued by the counsel on both sides, and the court has had all the assistance in the investigation of the case which their zeal and ability could furnish.

My brother Gresham did not hear the argument at the present term, but the questions were, more or less, fully discussed before him at the November term last year, when the petitioner made his application, and he has been consulted in the case, and concurs in this opinion.

We think, therefore, a receiver should be appointed.

For the opinion of the court in this case, on motion for appointment of a receiver, and construction of powers of the trustee, consult *Williamson vs. New Albany &c., R. R. Co.* Volume 1, of this Series, p. 198. [*Reporter.*

In re SUTHERLAND.

CIRCUIT COURT.—DISTRICT OF INDIANA.—NOVEMBER, 1870.

IN BANKRUPTCY.

1. A REVISORY PETITION—to the Circuit Court, under the second section of the Bankrupt Act must show wherein the error in the order or ruling of the District Court complained of consists, and its nature must be distinctly set forth. The case will not be taken up *de novo*.
2. Proper practice stated.

This was a petition for review, filed by William Sutherland, September 9th, 1870, under the second section of the bankrupt law of 1867, alleging that certain persons claiming to be his creditors had presented a petition to the District Court of this district to have him declared a bankrupt, for acts therein stated; that on denial of bankruptcy by him the case was submitted to the court on the third day of June, 1870, and he was then adjudged a bankrupt.

The petitioner alleged that he did not commit any of the acts of bankruptcy charged against him, and that he did not at the time owe three hundred dollars, and denied that he was in any way indebted to the petitioning creditors.

The petitioning creditors filed an answer to the petition, alleging that the petitioner took no exception or objection to the adjudication of bankruptcy, and did not cause the evidence to be made matter of record, nor did the petition to this court set forth the evidence given before the District Court.

To this answer Sutherland excepted.

McDonald & McDonald, for bankrupt.

Perkins & Perkins and *Hendricks, Hord & Hendricks*, for creditors.

DRUMMOND, J.—The exception of Sutherland to this answer as insufficient must be carried back to the petition itself, and, that being done, I am of opinion that upon its face no case is made for the revisory power of this court under the second section of the bankrupt law. If it be conceded that the circuit court, under that section, may revise any order or ruling made in the progress or at the end of the proceedings in bankruptcy, not provided for by the 8th section, still the petition or bill must show wherein the error in the order or ruling consists.[1]

The petition in this case appears to have been framed on the principle that if a party merely stated the particular order or ruling of which he complained, he could thus bring up the case to be tried *de novo*. That has not been the construction which has been given to this section. In this instance the petitioner alleges that he should not have been declared a bankrupt, because he did not owe three hundred dollars, nor did he owe the petitioning creditors, nor had he committed any act of bankruptcy. On all these points the District Court found against him. The only special circumstances to which the petitioner refers, is to a promissory note of $1,900, held by the petitioning creditors, and which he declares he did not owe, in consequence of the acts of the payee, one Moses; but the court may have been satisfied upon competent evidence that the note was assigned and held for value and in good faith before maturity; and if so, what took place between Sutherland and Moses might be immaterial.

It is not enough that the petitioner state a grievance, or allege that an error has been committed; but the nature of the error or grievance should be distinctly set forth, so that the appellate court may be able to judge of the same.

Here the evidence on which the District Court found against the petitioner is not spread out in the record so that this court can determine whether any error has in fact been committed.

It is to be regretted that the Supreme Court has not pre-

[1] *In re Alexander*, 8 Bankrupt Register, 6; *Ruddick vs. Billings*, Id., 14; *Littlefield vs. Delaware and Hudson Canal Co.*, 4 do., 77.

scribed some rule under the second section, as the practice is by no means uniform in the different districts. It is desirable that the proceedings should be as simple as possible, and, therefore, in ordinary cases it may be sufficient if a statement is made by counsel, under the direction of the judge of the district court, setting forth the order or ruling complained of, and sufficient facts to enable the appellate court to form an opinion upon the point. This, verified by the judge or clerk, might form the basis of the petition or bill in the circuit court. Of course it is not intended to intimate that the whole case may not be brought up by bill of exceptions, or otherwise; but generally the error complained of consists of a few rulings, and these disposed of, the rights of the parties are settled.

As there seems to have been a misapprehension as to the practice under the second section, I will allow the petitioner to amend his petition, if he shall be so advised.

There ought to be some limit of time within which the application should be made to the circuit court, and it will be observed that the petitioner did not file his petition until more than three months after the decree, a circumstance which would seem to need explanation.

The petition for revision should state clearly and specifically the question decided in the District Court. *In re J. M. Reed*, 2 Bankrupt Register, 2. —[*Reporter*.

UNITED STATES, EX REL. JOHN VAN NORTHWICK, vs. CITY OF STERLING.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—JANUARY 1871.

MUNICIPAL BONDS.

1. The fact that the total revenue of a city is used in defraying its current expenses, does not constitute a legal or sufficient excuse for not paying its maturing indebtedness.

2. DUTY OF CITY AUTHORITIES.—They have no right to spend their income in this way, leaving their bonds and other debts unpaid; but are bound to provide for and pay the latter, and on failure or refusal, this Court will, by *mandamus*, compel them so to do.

POWER TO COLLECT TAX.—A city, which by its charter has certain general powers of taxation, and by consent of a majority of its legal voters at a proper election, can levy and collect a further tax, cannot plead that they have not sufficient power to collect an adequate tax to pay their debts. Under such a charter the authorities should, from their ordinary revenue, discharge their legal indebtedness, and provide for their ordinary expenses by a further tax, according to their charter.

This was a demurrer to the return to an alternative writ of *mandamus*.

The substantial allegations in the application for this writ are that on the 20th of October, 1870, said relator, by the consideration and judgment of this court, recovered against said respondent, a municipal corporation of this state, with power to borrow money and issue bonds, a judgment for the sum of $5,069.57, which said judgment was for the amount then due and unpaid on certain bonds and coupons theretofore issued by said city to the relator; that due notice of said judgment had been given the respondent, and its officers requested to pay the same; but they failed and neglected to take any steps toward providing for such payment; and praying a writ of *mandamus* to compel the levy and collection of a sufficient tax to pay and satisfy said judgment.

To this writ the respondent filed an answer, admitting the recovery of said judgment and its non-payment, and also admitting the corporate existence of the respondent under the laws of this state, but insisting that by its act of incorporation said city authorities were only authorized to levy taxes at the rate of one per cent. per annum on the valuation of the taxable property of said city; that the expenses of said city government amount to about six thousand dollars per annum, and that the total receipts from taxes, licenses and fines, which were all the sources of revenue the respondent had, were only about six thousand dollars per annum. It further appeared from the return that said city charter contains in addition to the clause conferring power to assess and collect a tax of one per cent. on the valuation of the property of the city, this further clause: "The said city council may, however, levy and collect a tax for city purposes greater than one per cent., provided the same be done with the consent of a majority of the legal voters of said city voting at a general or special election ordered for such purpose." It further appeared that said city was in debt upon bonds bearing interest at the rate of ten per cent. per annum, exclusive of said judgment, to the amount of $6,424.70, and a floating indebtedness of about $2,100. In other words, the substance of the return was that all the revenue derived from taxation at the rate of one per cent. and from licenses and fines was used in the payment of the current expenses of the city government, leaving nothing with which to liquidate said judgment and the other maturing indebtedness.

To this return the relator demurred, as being an insufficient answer to the writ.

Jewett & Jackson, for relator.

F. Sacket and *M. S. Henry*, for respondent.

Blodgett, J.—The question raised by the demurrer is, does the return show a legal and sufficient excuse for the failure or refusal to pay the judgment referred to. There is no dispute as to the existence of the indebtedness, nor as to the power of

the respondent to incur the same, so that the only question is as to the power and duty of the court, upon the admitted facts, to enforce its payment by the process of *mandamus*. The only excuse or reason urged against the application being the want of power in the corporate authorities to levy the tax requisite for the purpose.

Questions kindred to this have of late attracted much attention, and been the subject of much discussion, both in this court and elsewhere, and the uniform tenor of the decisions has been such as to leave no doubt as to the general power of courts to enforce by *mandamus* the levy and collection of taxes by municipal corporations, for the purpose of paying the debts and obligations of such corporations. But it is insisted by the respondent that none of the cases have gone to the extent of compelling such levy and collection of taxes unless the same came within the delegated powers of the corporation.

For the purposes of this case I do not deem it necessary to discuss the abstract question as to what courts shall do in cases where there is a want of adequate power of taxation to pay a legally contracted indebtedness, as it seems to me the respondent has ample corporate power to meet this emergency. It has power to levy a tax of one per cent. on the assessed value of all real and personal property within its limits. And with the consent of its legal voters, expressed at any general or special election, it has an unlimited power of taxation. It seems then clear to me that if the tax of one per cent. was not sufficient to raise the amount needed to meet this liability, it was the duty of the city authorities to call an election and require its voters to vote a sufficient tax for the purpose. The duty of paying municipal debts is as obligatory upon the citizens as upon the officers of the city. Indeed, the city authorities are only the agents of the citizens. Besides, what right had the city officers to expend the entire income of the city from the one per cent. tax in payment of current expenses, and leave this indebtedness unprovided for? Why did they not, from the proceeds of this one per cent. tax, pay the bonds and coupons

on which this judgment was rendered, and take a vote as to the expediency of raising a further tax to defray current expenses? The proceeds of this one per cent. tax are not specially set apart and dedicated to the payment of current expenses.

The bonds for which this judgment was rendered had been legally issued, and the city authorities and voters were all chargeable with notice that they were due and ought to be paid. They should then have levied and collected an adequate tax in apt time to have the money ready when their obligations matured, and, having failed to do so, are guilty of a breach of duty which the writ of *mandamus* will compel them to perform.

In the case of *City of Galena vs. Amy*, 5 Wallace, 705, the city authorities of Galena had power, if they thought the public good required it, to levy a tax, etc. There the power was discretionary in the city authorities, and yet the court held that they were bound to exercise this discretion, and compelled them by *mandamus* to do so.

The same doctrine is enunciated with equal emphasis in *Supervisors vs. United States*, 4 Wallace, 435; *Von Hoffman vs. City of Quincy*, Id., 535; *People vs. City of Cairo*, 50 Illinois, 154; *Riggs vs. Johnson Co.*, 6 Wallace, 166. The aspect then of the case is this: The respondents owe the debt, and acknowledge their legal and moral obligation to pay it, but have failed to take the necessary steps to raise the funds wherewith to do so. They have the power to levy and collect an adequate tax, and their dnty is co-extensive with that power. For these reasons the *mandamus* must be made peremptory.

The U. S. Circuit Court has power to issue a *mandamus* requiring state or municipal officers to levy and collect a tax. *Lansing vs. County Treasurer*, 1 Dillon, 522; *United States vs. Muscatine County*, 2 Abbott's U. S. R., 58; *United States ex rel J. Edgar Thompson vs. Lee County*, *ante*, p. 77; and cases there cited.

The municipality having issued the bonds may be compelled to pay the interest. *Flagg vs. Mayor, &c., of Palmyra*, 38 Missouri, 440; *St. Joseph &c. R. R. Co. vs. Buchanan County Court*, 39 Missouri, 485.

Consult also *United States vs. Mayor, &c. of Burlington*, 2 American Law Register (N. S.) 394. [*Reporter.*

UNITED STATES vs. STEWART.

DISTRICT COURT.—NORTHERN DISTRICT OF ILLINOIS.—JANUARY 1871.

DISTILLER'S TRANSPORTATION BOND.

1. To a suit upon a bond for the transportation of highwines, it is a sufficient defense that during the act of transportation the officers of the Government seized them, and that the collector of the district to which they were consigned refuses to grant a certificate of delivery to him.

2. The Government having by its own act prevented the performance of the condition of the bond, is estopped from recovering upon such a breach.

3. The fact that the seizure was made by reason of the wrongful act of the persons having the highwines in charge makes no difference. The Government had the election to seize them in transit or await their delivery; but if it does the former, it cannot afterwards sue for the breach of the bond.

4. To a plea setting up the above facts it is not a good replication that the seizure was properly made for a violation of the internal revenue laws, for which the wines were afterwards duly forfeited in the District Court.

This was an action of debt on behalf of the United States against Stewart and his sureties upon his transportation bond. The facts appear in the opinion.

J. O. Glover, U. S. District Attorney, for the United States.

Goudy & Chandler, for defendants.

BLODGETT, J.—This is a suit upon a distiller's bond for the transportation of 100 barrels of highwines from Keithsburg, Ill., to St. Louis, Mo., and the delivery thereof to Barton Able, Collector of the First District of Missouri. The third plea of the defendants sets forth in substance that said wines were duly transported to St. Louis and landed upon the levee there, and were then, immediately after their arrival, seized by an

officer of the United States, and while in the exclusive possession and control of such officer, seven barrels of said wines were, without the consent, fault or neglect of defendants or either of them, carried away to some place unknown by some person or persons unknown; and that the remaining 93 barrels of said wines were afterwards by the said officer removed from said levee, and delivered to Barton Able, collector of the First District of Missouri, who received the same and placed them in a warehouse in St. Louis, where they have ever since remained. Defendants also aver that such seizure was without their privity or consent, and that said Barton Able hath ever since refused to make and deliver to defendants a certificate showing that said highwines or any part thereof have ever been delivered to him.

To this plea a replication was filed, setting up in substance that 93 barrels of said wines were seized upon an information filed in the U. S. District Court for the Eastern District of Missouri for an alleged violation of the internal revenue laws, and that afterwards such proceedings were had in said court on said information that a decree of forfeiture was entered against said highwines for said violation of the internal revenue laws; and to this replication a demurrer is interposed by the defendants.

Some technical objections to the form of this replication were made in the demurrer, but as no stress was laid upon them in the argnment I shall proceed at once to consider the main question raised by the pleadings, which is, whether the replication is a sufficient answer to the plea, and whether said plea is a sufficient answer to the declaration.

The condition of the bond is that the said 100 barrels of highwines shall be transported from the bonded warehouse of said Stewart at Keithsburg, in the 4th District of Illinois, to the city of St. Louis, and there delivered to Barton Able, collector of the 1st District of Missouri, within ten days from the date of said bond; and that within ten days thereafter a certificate of said Able, or his successor as such collector, showing that said wines had been so delivered

to him, and by him placed in a bonded warehouse in his district, should be produced to the collector of the 4th District of Illinois. The effect of the defense thus set up is that while the obligors in the bond were in the act of performing said condition, said highwines were seized by the revenue officers of the United States, and while so held seven barrels were taken away by some person unknown, and the replication avers that the remaining 93 barrels were afterwards libelled and condemned for alleged violation of the internal revenue laws. By the conceded facts, then, performance of the condition of this bond has been prevented by the acts of the agents of the obligee. In other words, the plaintiff has, through the agency of its officers, rendered the performance of the condition of the bond impossible. True, the seizure which made it impossible for the defendants to fulfill the condition of the bond, was made by reason of the wrongful act of some one having said wines in charge. But does that make any difference? The Government had its election to seize them in transit, or await the performance of the condition of the bond and seize them afterwards. The wines could not be in two places at once. If the Government interposed to prevent their delivery under the bond, is it not estopped from recovering for a breach of the bond caused by its own act?

No direct authorities upon bonds of this character have been cited, nor have I been able to find any. But the case seems analogous in all essential principles to the case of *People vs. Bartlett*, 3 Hill, 570. In that case a recognizance had been entered into for the appearance of the principal to answer a criminal charge. Default was made, and to a *sci. fa.* on the recognizance it was pleaded that the principal had, after giving said recognizance, been arrested, and was then held in confinement in state's prison under another criminal charge. The court held the plea sufficient, and Nelson, chief justice, said, "I am of opinion that the plea is "a good answer to the action. It is a general principle of law "that when the performance of the condition of a bond or "recognizance has been rendered impossible by the act of God,

"or of the law, or of the obligee, the default is excused." The principle enunciated in this authority is certainly broad enough in its fair, logical application to support the defense to the bond set up by the plea, and the replication, instead of answering the plea, only goes more into the detail of the same proceedings on the part of the Government which the plea relies upon. It certainly does not answer the plea to say that the goods were not only seized, but were afterwards condemned by the same judicial proceedings initiated by the seizure. The replication only makes it more certain that the performance of the condition of the bond has been rendered impossible by the act of the obligee.

The demurrer to the replication is sustained.

THE CITY OF FREMONT.

DISTRICT COURT.—EASTERN DISTRICT OF WISCONSIN.—JANUARY TERM, 1871.

IN ADMIRALTY.

1. A seaman on a lake vessel, having shipped under a verbal agreement without signing shipping articles, may leave the vessel at any time.
2. If he draws the wages promised, not demanding more, he cannot recover a larger amount under the Act of July 20, 1840.
3. Duty of master as to shipping articles stated.

This was a libel by Robert Brittain, a seaman, for additional wages.

The vessel libelled was employed in trade between the port of Sarnia, in Canada, and the city of Chicago, in connection with the Grand Trunk Railroad. On the twenty-fourth

day of May, 1870, at Chicago, the libellant shipped on board as first mate on verbal contract with the master, at seventy dollars per month, no shipping articles being signed. Libellant continued in service on board, drawing his wages from time to time as he wanted money, until the thirty-first day of October following, when he left the vessel at Milwaukee, having drawn his full wages at the rate of seventy dollars per month, and not making demand for any larger sum. The vessel was on a trip from Sarnia to Chicago when libellant left, having notice to return on board, as the vessel was ready to put out; he declined or neglected to appear, and the vessel had to be navigated to Chicago without a first mate, where the master procured another in his place.

Emmons & Hamilton, for libellant.

James MacAlister, for respondent.

MILLER, J.—It is contended on behalf of the libellant that not having signed shipping articles in a printed or written contract, he was at liberty under the law to leave the vessel at pleasure, and demand the highest rate of wages.

By the act for the government and regulation of seamen in the merchant service, approved July 20, 1790,[1] every master of "any ship or vessel of the burthen of fifty tons or upwards, bound from a port in one state to a port in any other than an adjoining state, shall, before he proceed on such voyage, make an agreement in writing or in print with every seaman or mariner on board such ship or vessel," etc. By the tenth article of the act approved July 20, 1840,[2] in addition to the several acts regulating the shipment and discharge of seamen, "All shipments of seamen made contrary to the provisions of this and other acts of Congress shall be void, and any seaman so shipped may leave the service at any time, and demand the highest rate of wages paid to any seaman shipped for the voyage, or the sum agreed to be given him at his shipment." The

[1] 1 U. S. Statutes at Large, 131.
[2] 5 U. S. Statutes at Large, 394.

general scope of this act relates to vessels bound on a foreign voyage, but the tenth article above quoted extends to and includes all shipments of seamen. Even if these statutory provisions did not embrace seamen shipped on vessels employed in the lake trade, they should be enforced by the courts as correct principles of maritime law. This vessel, at the time of the shipment and service of the libellant, was employed in trade with a foreign port. Libellant had drawn his full wages promised him at the time of his shipment, and left at his pleasure. He took advantage of the right extended to him under the act of 1840. Before leaving the service he had not demanded or given notice that he claimed a larger amount. Libellant had a lawful right to leave the service at Milwaukee, and having received the full wages up to that time, as promised him at his shipment, he should not maintain this libel for a larger amount, if he had proven himself entitled to it, which he did not. If the master was put to inconvenience by libellant's leaving the service, it was his own fault in not complying with the law. It is the duty of every master navigating the lakes to have his seamen sign shipping articles, specifying the ports or places to which his vessel trades, and the trip or season for which they are shipped, and the wages to be paid. In cases of such neglect, every legal intendment will be taken against the master and owners. It is not the fault of the seaman that shipping articles are not signed, but of the master.

It does not appear that libellant is legally entitled to any larger amount of wages than he received before leaving the service; and this libel must be dismissed.

NORTH AMERICAN INSURANCE COMPANY vs. WHIPPLE.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—JANUARY 1871.

1. A court of equity has power to reform and cancel an insurance policy issued by mistake for a greater length of time than was intended by the parties.

2. Circumstances stated under which a policy will be cancelled even after a loss has occurred.

This was a bill to amend and reform an insurance policy issued to the defendant on the 22d of October, 1864, and to enjoin the prosecution of a suit at law upon it.

The defendant on that day called at the office of B. W. Phillips & Co., agents for this and several other insurance companies asking for insurance on his stock of goods in Chicago, for two months, which insurance was apportioned among the different companies represented by Phillips & Co., of which the complainant took $10,000. The application was filled out in due form, for the period of two months, in the presence of Whipple, and was the memorandum used by the policy clerk in making out the policies; the total premium paid by the defendant was $60, which was proved to be the regular rates for two months insurance in the respective companies for the amounts insured by them; wherever any record of the policy appears on the books of the insurance agents, it appears as a two months policy. The policy clerk who filled out the policy testified that he made a mistake in making it out, by filling out the policy to run until the 22d of December, 1865, instead of two months, according to the memorandum of application handed to him.

The stock of goods was totally destroyed by fire on the 16th of December, 1865, and the defendant claimed that the insu-

rance company was liable to him, and had commenced suit to recover the amount of his policy.

The defendant's answer, the oath having been waived, insisted upon the validity of the policy, and that it was meant to be issued for fourteen months.

Goodwin, Larned & Towle, for complainant.

E. A. Storrs, for defendant.

BLODGETT, J.—It is easy to see how, in the filling up of printed blanks, a mistake like that alleged by the complainant might happen; and the policy clerk says that it occurred from the fact that he was accustomed, in the majority of instances, to fill up yearly policies. All the other policies were made out for two months, that is they expired on the 22d of December, 1864, instead of the 22d of December, 1865.

This is not contradicted by the defendant. Defendant himself, who personally procured this insurance, has no recollection, or does not testify to any, in regard to what transpired at the time he applied for the insurance. He admits that he obtained the insurance at the time mentioned, but does not profess to remember the time the policies were to run, from anything he can now recall of the transaction. It is shown in the proofs, and I presume it would be taken notice of without proof, that fourteen months is an unusual time for the life of an insurance policy. The usual time is two, three, four, six, and twelve months, and if, for any reason, the defendant had had occasion to apply for a policy so much out of the usual course of business, it would have made some impression upon his memory and that of the clerks and agents of the insurance company who participated in the transaction. So, also, the fact that only so small an amount was paid for a policy having so long a time to run would seem to be a circumstance calculated to excite attention and impress itself upon the memory. It is true that the defendant testifies that he afterwards sent his policies to the insurance agents to have them looked over and mistakes corrected; but both the agents

deny that they ever saw this policy, and assert positively that they supposed the same had expired on the 22d of December, 1864, and had so entered the same on their books, and so informed complainant, and had no knowledge that the policy in question was claimed to be in force, until after the fire.

Under the evidence in this case I can but conclude that the substantial allegations in the bill are made out by the proofs, and that the complainant is entitled to the relief prayed.

Decree accordingly.

If by fraud or mistake the terms of the order for insurance have been departed from in the policy, the court will consider the order as containing the contract between the parties, and variance from the order, unless contradicted by the proof, would be evidence of mistake. But the order can only be resorted to, so far as it varies from the policy, and in all other respects the policy will govern. *Delaware Ins. Co., vs. Hogan*, 2 Washington, 4, *Collett vs. Morrison*, 9 Hare's Chancery, R. 162.

If from mistake, the policy has been so framed, as not to correspond with the previous agreement of the parties, the error may be corrected, and the policy reformed in a court of equity; but this equitable power of remodeling a written agreement, is wisely exercised with extreme caution, and only upon the clearest evidence. To justify the remedial action of the court, the existence of the mistake, if positively denied by the insurer, must be established by proof morally irresistible. 1 Duer on Insurance, p. 71.

A court of equity is the proper tribunal to reform a policy, but the evidence for this purpose must be very clear. *Henkel vs. Royal Exchange Assurance Co.*, 1 Vesey, Sr. 317.

If a policy, when drawn and received, does not correctly express a previously concluded agreement for insurance, which it was designed by both parties to execute, equity will reform it. *Oliver vs. Mutual &c. Ins. Co.*, 2 Curtis, 277.

There cannot be any doubt that a court of equity has authority to reform a contract, where there has been an omission of a material stipulation by mistake. A policy of insurance is within this principle. But a court ought to be extremely cautious in the exercise of such an authority. It ought to withhold its aid where the mistake is not made out by the clearest evidence. *Andrews vs. Essex &c. Ins. Co.*, 3 Mason, 7. *Phœnix Ins. Co. vs. Gromes*, 1 Paige's Chancery, R. 278.

In the above cases the loss had occurred before bill filed. [*Reporter.*

DUNNING, Assignee, &c., vs. PERKINS.

Circuit Court.—Northern District of Illinois.—January, 1871.

In Bankruptcy.

1. When a merchant stops payment on his commercial paper, and the holder commences suit thereon, to which there is no defense, he has reasonable cause to believe the debtor is insolvent.

2. If afterwards, knowing that the debtor is obliged to ask extensions, he, within the time designated in the act, takes security and dismisses the suit, then the securities can be recovered by the assignee in bankruptcy.

Replevin by Seth M. Dunning, assignee of John D. Rice, bankrupt, for securities deposited with defendants by the bankrupt as collaterals.

On the 26th of June and 11th of August, 1858, the defendants, as attorneys for Hendrickson, Doll and Richards, commenced, in the Superior court of Chicago, suits against John D. Rice, a merchant then doing business in Chicago, upon his promissory notes then dishonored. Rice had no defense to the notes, and early in September went to the defendants, stated to them that he was indebted in the aggregate to the amount of about five thousand dollars, and that, although he could not meet his paper as it came due, if he could procure an extension from his creditors by giving them security, he could pay all he owed. On the 14th of September he deposited with the defendants the securities, to recover which this suit was brought, and thereupon they dismissed their suits against him.

On the 13th of December in the same year he filed his petition in bankruptcy in this district, was afterwards adjudged a bankrupt, and on the 19th of February, Dunning was appointed assignee.

Case tried by the court.

Charles L. Easton, for plaintiff.

J. A. Cram, for defendants.

DRUMMOND, J.—The fact that the two notes given by Rice, he being a merchant or trader within the meaning of the bankrupt act, were not paid, was enough to excite distrust as to his pecuniary condition. When a creditor is compelled to bring suit against a merchant for non-payment of notes bearing the character of commercial paper, and to which there is no defense, that is sufficient to create a suspicion in his mind that the debtor is insolvent, and it is the duty of the court under such circumstances to scan closely all methods of obtaining a preference by one creditor over another. The only argument that can be used in behalf of the defendants is that they had no reasonable ground for supposing that Rice was insolvent. But if they believed that he had property sufficient to liquidate all his indebtedness, why take this security? I do not mean that because a man takes security it always follows that he has reason to believe the debtor insolvent; but when, as in this case, the creditor has brought suit upon commercial paper, to which there is no defense, and then by arrangement with the debtor the suit is dismissed and security is taken, and the fact is that the debtor at the time was insolvent, this makes out a strong case. If a creditor under such circumstances takes security, he does so at his peril.

The plaintiff must recover.

CAMPBELL, Assignee, &c., vs. TRADERS' NATIONAL BANK.

District Court.—Northern District of Illinois.—January, 1871.

In Bankruptcy.

1. A firm which for months has been unable to meet its liabilities as they mature, and was being pressed for payment, whose book-keeper had absconded, notifying its members of an error in their books to an amount equal to their general balance according to a recent statement, is insolvent within the meaning of the Bankrupt Act, and its members have no right to believe themselves solvent.

2. Giving Warrant of Attorney is Preference.—Although some unusual event might enable them to pay their debts, they could not expect to do so in the ordinary course of business; and if in such circumstances they execute a warrant of attorney to one of their creditors, they are giving a preference.

3. Intention Presumed.—Though they and the creditors say that it was not given for that purpose, yet such is its legal and necessary effect, and a man is presumed to intend the necessary consequences of his own acts.

4. When Preference Set Aside—Though the creditor be guilty of no fraud in fact, yet if, suspecting the solvency of his debtor, he obtains property or money, and thereby a preference, and his debtor proves to be insolvent, he may be said to have had reasonable ground to believe that his debtor was insolvent, and cannot avail himself of a judgment or security so obtained; the fact that the warrant of attorney was executed under threats of legal process and arrest, and in fear of disgrace, does not shield the debtors; the act is, nevertheless, voluntary.

5. "Suffering" Defined.— There is a proper distinction between the words "suffer" and "procure," as used in the act; and it is these very things which a debtor under pressure and powerful motives brought to bear upon him "suffers," which the act intends to prevent.

It seems, that where a man acts without knowledge of the condition of his debtor, or of anything to create suspicion of his solvency, and in good faith obtains a payment or security, the Bankrupt Law will not interfere with it.

Campbell, Assignee, &c., vs. Traders' National Bank.

This was a bill by George W. Campbell, assignee of Hitchcock & Endicott, bankrupts, to recover the proceeds of goods sold on execution upon judgments entered by confession a short time before the commencement of bankruptcy proceedings. It was claimed that the judgments were entered in fraud of the bankrupt act, the debtors being insolvent at the time the warrants of attorney were given, and their condition being known to the creditors.

The bankrupts, being wholesale merchants in Chicago, commenced doing their banking business with the Traders' National Bank, in the fall of 1866. Early in the spring of 1867, being financially embarrassed, they gave to the defendants, Hotchkiss & Sons, a note with warrant of attorney, for a debt of over $1,300.

In May, 1867, the president of the Traders' Bank inquired into the standing and pecuniary position and resources of Hitchcock & Endicott, partly, it would seem, to satisfy himself as the president of the bank, and partly with a view of properly answering inquiries that were made as to their condition. About the 10th or 12th of May, in reply to a request made by the president of the bank to Hitchcock & Endicott, a statement was furnished purporting to set forth the condition of the house—their assets, resources and liabilities—which showed a balance in their favor of over twelve thousand dollars. This statement seems to have been, to some extent at least, satisfactory to him, and the business went on in the usual way.

During this time the bank had made very considerable loans to Hitchcock & Endicott, amounting by the 28th of May, to several thousand dollars. On the 24th of May, however, the president of the bank had received some information which induced him to believe that the statement which had been previously furnished was untrue. It appeared that the book-keeper of the firm had run away, leaving a letter to Mr. Hitchcock, saying that in the statement already referred to, a mistake of ten thousand dollars had been made, their liabilities being ten thousand dollars more than had been

represented. Upon learning this fact, the president of the bank became somewhat alarmed, as to the condition of the account between the bank and Hitchcock & Endicott, as well as indignant that a false statement had been presented to him with a view of deceiving him, and took immediate measures to secure the indebtedness to the bank. During all this time, the house of Hitchcock & Endicott was in embarrassed circumstances, and did not meet its paper as it fell due. Renewals were made from time to time, and when notes and bills would become due to the Traders' Bank, instead of being paid, a new transaction, as the president called it, was made, by which the loan was extended; in other words, the old note or bill was taken up and a new one given.

Mr. Endicott was absent from the city at that time, and until immediately before the matter was finally closed. On the 28th of May a suit was commenced by the Traders' Bank against the firm, and an affidavit was made for a *capias* against Hitchcock on the ground that the statement made as to the condition of the firm was fraudulent. A summons issued against Endicott, and a *capias* against Hitchcock. As the result of this proceeding, on the 28th of May, in the evening, and under the threat of an arrest of Hitchcock by the sheriff, he and Endicott, the latter being induced to do so, as he said, in consequence of his belief that he was implicated with Hitchcock, consolidated all the indebtedness then due to the bank in a note, payable on demand, which they signed, and with which they gave a warrant of attorney to confess judgment thereon; and a judgment was accordingly entered on the next day, May 29th, 1867, against them, and execution issued and levied.

On the 30th of May, Hotchkiss & Sons filed their warrant of attorney, and took judgment against Hitchcock & Endicott, and issued execution. The property of the firm was sold by the sheriff under these executions, and the proceeds placed in the Traders' Bank.

This occurred a few days before the bankrupt law went into effect as to the filing of petitions, the *proviso* at the

end of the law being, "that no petition or other proceeding under this act shall be filed, received or commenced before the first day of June, A. D., 1867."

During the month of June, Hitchcock & Endicott filed a petition in bankruptcy, and some of their creditors also filed a petition against them. The former was abandoned, and the case proceeded under the involuntary petition. An injunction was issued from the district court to prevent the sale of the property, but a sale, as has already been stated, had been made by the sheriff. No application had ever been made to the court upon the subject, it being understood that the controversy was to be settled by a bill in chancery.

Melville W. Fuller, for assignee.

Samuel W. Fuller and *Mattocks & Mason*, for defendants.

DRUMMOND, J.—There are several questions which arise, and which it becomes necessary to decide.

The first is, whether in executing the warrants of attorney authorizing the judgments to be taken against them, Hitchcock & Endicott violated any provision of the bankrupt law.

Secondly. Whether, if so, the Traders' Bank is affected by the action of Hitchcock & Endicott in such a way as to prevent it from availing itself of the money or property thus obtained.

As a part of these are several minor questions.

Were Hitchcock & Endicott insolvent at the time they executed the note and gave the warrants of attorney to confess judgment?

I have no doubt that they were, in fact, insolvent on the 28th of May, 1867. Their liabilities were between $30,000 and $40,000, and the difference between the assets and liabilities was such at the time that no intelligent business man could fail, I think, to reach the conclusion that they had not enough to pay their debts. There is no doubt *now* of the fact that they were insolvent. It has not been seriously controverted in the argument. It has been claimed that Hitch-

cock & Endicott did not believe they were insolvent, but thought that they would be able to continue their business and pay their debts.

Without dwelling longer upon the proof in favor of the conclusion that they were actually insolvent, we will proceed now to another question, namely—whether they, as reasonable and intelligent men, had a right to believe that they were insolvent.

They say that they thought they would be able to pay their debts. But why did they so think? They had been struggling for months to pay their debts, and had not done it. Bill after bill, and note after note, had matured, and had not been paid. They had given, early in March, a warrant of attorney authorizing a confession of judgment. They had been already sued; were on the 28th of May specially pressed by the Traders' Bank for payment or security of an indebtedness of more than six thousand dollars, which they could not meet. Their book-keeper had absconded, leaving word that he had made a mistake of $10,000 in the statement of their condition. As reasonable and intelligent men, what right had they to believe that they were in a solvent condition? Especially, if they complied with the peremptory and threatening demand of the president of the Traders' Bank, and gave a warrant authorizing a confession of judgment with the power to proceed against them at once, upon what ground could they suppose that they would be able to pay their debts? I cannot see, looking at the case as it is presented under the evidence, that there was any reason from which they could infer that they could pay their debts, in the ordinary course of business. Undoubtedly it was possible that some unforeseen event might enable them to do it, but in the regular course of business, judging by what had taken place for several months past, extrication would seem well nigh impossible. Therefore, looking at their position with that degree of intelligence which every business man is supposed to bring to bear upon the state of his affairs in such an emergency, the best that could be said was that

they were financially in an extremely critical condition. Certainly the president of the Traders' Bank so thought, if we are to judge by his actions.

In this state of affairs they were called upon, under the threat of an arrest from the principal creditor, to sign a note and give a warrant of attorney to confess judgment.

If they were insolvent, as a matter of fact, and they were called upon in this way to give a note and warrant, with what object was it done? They say it was not to give a preference to the Traders' Bank. The president of the Traders' Bank also says that it was not done for that purpose. But for what other purpose could it be done than to give a preference? It follows as a legal conclusion, I think, from the state of facts then existing, and which facts were known to Hitchcock & Endicott, and from which they must be presumed to draw reasonable and intelligent conclusions, that the giving of this note and warrant of attorney did, in point of fact, operate as a preference.

There is only one possible contingency from which that result could be avoided, namely, that they signed the note and warrant of attorney under the belief that it would not be used, as a security, against them, and it is not pretended that there was anything of that kind attempted, or any hope to that effect held out to them. Mr. Endicott, it is true, says that he signed the note under the declaration of the counsel of the bank, when interrogated as to what would be done with the note and warrant of attorney if signed, that upon that point he had no instructions from the bank. Certainly no intelligent person could infer from such a statement that the warrant of attorney might not be used immediately, and that instructions might not come as soon as the warrant of attorney was signed, as in fact they did.

It is to no purpose that a man says, when he is insolvent and signs a note and warrant of attorney and gives it to his creditor, the effect of which is to enable that creditor to enter up judgment and issue execution and levy on his property, that he did not intend to give a preference. Actions, in

this as in so many other cases, speak louder than words, and the conclusion necessarily follows from such a state of facts, that he does intend to do what is the necessary consequence of what he does, or, according to the oft repeated statement of the books, a man is supposed to know what is the necessary consequence of his own acts.

Then, the next question is—Had the president of the bank reasonable ground to believe that Hitchcock & Endicott were insolvent? I think he had.

The language of the 35th and 39th sections of the bankrupt law is, substantially, that when there is a payment, sale, assignment, transfer or other conveyance made, or a warrant of attorney to confess judgment given, by a person who is insolvent, with the intention of creating a preference, and the party to whom it is so given has reasonable ground so to believe, the act by which that preference is sought to be accomplished shall become nugatory, and whatever money or property has been acquired thereby can be recovered back by the assignee in bankruptcy.

I do not suppose that the president of the bank was guilty of, or intended to commit any fraud in fact. His bank had loaned Hitchcock & Endicott a very considerable sum of money; he had become alarmed as to their condition, and desired to put an end to all business transactions between the bank and them, and naturally wished to obtain his debt or security for it as soon as practicable.

His whole conduct evinced alarm, and a suspicion that Hitchcock & Endicott would not be able to pay their debts. And I take it to be a sound rule, that when a person suspects the solvency of his debtor, and in consequence of that suspicion obtains property or money, and thereby a preference, and it turns out in fact that his debtor is insolvent, that he may be said to be in the predicament contemplated by the bankrupt law; he has reasonable ground to believe that his debtor is insolvent, and so cannot avail himself of the payment made or the security obtained.

The 39th section of the bankrupt law declares that if any

insolvent person shall give any warrant to confess judgment, or procure or suffer his property to be taken on legal process with intent to give a preference, he shall be deemed to have committed an act of bankruptcy.

There remains, then, the question whether Hitchcock & Endicott, within the meaning of the law, *suffered* their property to be taken on a legal process.

It has been insisted that they were not within these terms of the bankrupt law. I admit that it must be an act of volition on their part; it must be, in other words, something that is done voluntarily. The mind must act freely, not under duress; and the question is, whether Hitchcock & Endicott did, in this case, within the meaning of this law, suffer their property to be taken on legal process. I think they did.

It is true that there was a moral force brought to bear upon them to induce them to sign the note and give the warrant of attorney, but they did it, as they say, because they did not wish to bear the indignity and the injurious effects which might flow from the arrest of one member of the firm. But it was none the less a voluntary act on their part. They, as free agents, signed the note and warrant of attorney. The motives that were brought to bear upon them may have been of more or less stringency, but it was not done under duress. Indeed, the threat of arrest was made upon an ordinary *capias* in a civil suit, and it does not even appear that the arrest could have been sustained.

Then, being voluntary, did they intend to suffer their property to be taken on legal process? If they did not intend this, what did they intend? For what did they give the note and sign the warrant of attorney? What possible object could the president of the Traders' Bank have had in demanding the execution of these instruments, except to take their property on legal process?

As rational and intelligent men, what other inference could they draw from what had taken place? And looking at the matter under the operation of these causes, what other conclusion can follow than that they intended to suffer their property to be taken on legal process?

I entirely agree with those courts which declare that the word "suffer" is different from the word "procure;" "suffer" implies a passive condition, so to speak—as to allow to permit—not a demonstrative, active course, like the word procure. It is the very definition, I think, to apply to the case of pressure and powerful motives brought to bear upon a party. Under the influence of this pressure and the operation of these motives, he *suffers* a thing to be done—that is, allows or permits it—and the law intended to prevent this.

Again, it is impossible to lose sight of the time during which these matters were transacted—the 28th and the 29th of May, 1867. The bankrupt law went into operation on the 1st of June, a few days afterwards, so far as to allow the filing of petitions. The president of the Traders' Bank acted under the influence, as he admits, of the bankrupt law, and of certain views and opinions which he had in relation to it. What was to be done had to be done quickly, or on the 1st of June these parties or any one of their creditors could file a petition in bankruptcy, and then there was no chance of any preference. So that the inference, I think, derivable from the peculiar juncture at which the transactions took place, is unfavorable to the Traders' Bank, as well as to Hitchcock & Endicott.

The great principle of the bankrupt law—the equal distribution among all the creditors of the property of a man unable to pay his debts—is, I think, attacked in this case by the attempt by which the Traders' Bank sought to obtain a preference. It was natural, perhaps, that the president of the Traders' Bank should seek the payment of the debt; most men, possibly, would have done the same; but it is not the less true, in my judgment, that such a course of action does interfere with the operation of the bankrupt law, and prevent the equal distribution of the assets of this firm to their creditors.

It has been said, and will be said again, that we ought not to prevent or interfere with the ordinary business operations

between man and man. That is true, and we do not attempt to do it unless there is something in the transaction indicating that the man who makes it has reason to believe that he is getting what ought to belong to the creditors generally, and if so, the bankrupt law declares that he cannot avail himself of money or property thus obtained. But where a man acts without knowledge of the condition of the party or of anything to create suspicion of his solvency, and in good faith obtains a payment or security, then the bankrupt law will not interfere with it.

The Traders' Bank has obtained the benefit of an unwarrantable preference; the property has been sold and the money paid over to them—possibly sold at a sacrifice; the proof as to what it was actually worth is not, perhaps, very satisfactory; and although, in many cases, what property may bring at a forced sale is not the true criterion of its value, I feel inclined to take that view of the case in this instance, and to hold that the Traders' Bank is responsible for nothing more than the proceeds of the sale. The property was sold under two executions, that of the Traders' Bank and Hotchkiss & Sons, and the proceeds were more than the execution of the Traders' Bank. There was besides a payment of over $300 made on the debt, of money in the hands of the Traders' Bank, on the 29th of May, and for which a check was given, and there was $900 of money which was levied upon in the hands of the Traders' Bank, by the sheriff, at its instance. I think that these incidents will have to follow the principal; that the result of the reasoning which has been stated leads necessarily to the conclusion that the same consequences flow from the payment and levy of these sums, and therefore that they would be included as a part of the amount of damages for which the Traders' Bank would be responsible, and I think the Traders' Bank will be liable, also, for the interest from the time of the receipt of the money. As some incidental questions may arise, perhaps it is better that the case should be referred to a master.

Referred accordingly.

On appeal to the Circuit Court, Judge Davis, of the Supreme Court, sitting as circuit judge, affirmed the decision below, filing the following opinion:

DAVIS, J.—This case was argued with ability and earnestness, and I have carefully considered the questions presented in connection with the evidence.

My conclusion, on the whole evidence, is that Hitchcock & Endicott, when they gave the note and warrant of attorney to the Traders' National Bank to confess judgment, were, in fact, insolvent, and, as reasonable men, had good cause to believe themselves insolvent, and that the president of the bank had reasonable ground also to believe them insolvent.

The evidence also satisfies me that the note and warrant of attorney were executed with a view to give a preference to the bank.

The evidence also establishes the fact that Hitchcock & Endicott "suffered" their property to be taken on legal process.

If the evidence establishes these propositions, and I think it does, clearly, then the decree of the District Court was correct, and should be affirmed.

Decree affirmed.

The Supreme Court, on appeal, again affirmed the decision of the court below, the opinion being reported in 14 Wallace, 87.

Consult *Golson vs. Niehoff*, following case; *In re Weeks*, *ante*, p. 259; *In re Eldridge*, *ante*, p. 362, and authorities there cited.

As to what constitutes insolvency, consult *Merchants' National Bank of Hastings vs. Truax*, 1 Bankrupt Register, 146; *In re Gay*, 2 do., 114; *In re J. B. Wright*, Id. 155; *Wadsworth vs. Tyler*, Id., 101; *Scammon vs. Cole*, 3 do., 100; *Graham vs. Stark*, Id. 92; *Driggs vs. Moore*, *Foote & Co.*, Id., 149; *Rison vs. Knapp*, 4 do., 114; *Hall vs. Wager*, 5 do., 181; *Wilson vs. City Bank*, Id. 270; *Toof vs. Martin*, 13 Wallace, 40.

In order to invalidate a transaction, it is not necessary that the debtor at the time should consider himself insolvent. *Haughey vs. Albin*, 2 Bankrupt Register, 129; *Graham vs. Stark*, 3 do., 92; *Scammon vs. Cole*, Id., 100; *Rison vs. Knapp*, 4 do., 114; *Hall, Assignee, vs. Wager & Fales*, June Term, 1871, to appear in subsequent Volume of this Series.

What constitutes "suffering his property to be taken," &c.: *In re Black & Secor*, 1 Bankrupt Register, 81; *Wilson vs. Brinkman*, 2 do., 149; *Fitch*

vs. McGie, Id. 164, and to appear in subsequent Volume of this Series; *In re Dibblee*, Id., 185; *In re J. B. Wright*, Id., 155; *In re* Wells, 3 do., 95· *Hardy vs. Clark*, Id., 99; *Street vs. Dawson*, 4 do., 60; *Wilson vs. City Bank*, 5 do 270; *Kohlsaat vs. Hoguet*, Id 159. [*Reporter*.

GOLSON vs. NIEHOFF.

DISTRICT COURT.—NORTHERN DISTRICT OF ILLINOIS.—JANUARY, 1871.

IN BANKRUPTCY.

1. NOTICE OF INSOLVENCY—WHAT CONSTITUTES.—The simple fact that a man doing a large business obtains renewals of his commercial paper or pays under special circumstances a large discount, is not notice of insolvency to a creditor, it being shown that at that time similar commercial paper was selling at equal rates in the market.

2. PREFERENCE—Upon a judgment note is obtained when the judgment is entered, not when the warrant of attorney is given.

3. JUDGMENT BY CONFESSION—WHEN A PREFERENCE.—If at the time of the entry of judgment the creditor had knowledge of his debtor's insolvency, or of such facts as to make it reasonable to believe him insolvent, the collection of a debt or entry of judgment and issue of execution is a preference under the act.

4. The fact that the note and warrant of attorney were given for a *bona fide* debt, and that the creditor at that time had no knowledge of the debtor's insolvency, does not sustain such subsequent judgment.

5. Circumstances stated which are sufficient notice to a creditor of his debtor's insolvency.

This was a summary proceeding by petition by the Trustees of the estate of Adam Baierle, bankrupt, against Conrad L. Niehoff and Gustavus Troost to recover money received by them on an execution sale of property of the bankrupt. The petition sets forth in substance, that in January, 1869, said bankrupt borrowed of the respondents, Niehoff & Co., five

thousand dollars, for which he gave his promissory note, with one Hoffman as surety, payable to said Niehoff & Co. in four months; that said indebtedness was extended by agreement from time to time between the parties until the 12th of November, 1869, when Baierle paid respondents one thousand dollars, and obtained a further extension of sixty days on the remaining $4,000; and on the 12th of January, 1870, the further sum of one thousand dollars was paid to respondents, and an extension for sixty days given for the remaining three thousand dollars; that on the 9th of October, 1869, Baierle borrowed of respondents the further sum of $1,000, for which he gave his note, with one Grater as surety, payable to respondents in thirty days, to which said note was attached a warrant to confess judgment, and which note was, on the 12th of November, 1869, extended for the term of sixty days; and on the 12th of January, 1870, a further extension of sixty days was obtained; that for all these loans and extensions large discounts were paid by the bankrupt, amounting to at least two and a half per cent. per month; that at the time said extensions were obtained said bankrupt was insolvent, and that the fact of his not paying said notes at maturity, and his paying such extortionate and usurious rates of discounts or interest, were sufficient to put said respondents on inquiry, and give reasonable cause to believe him insolvent; that on the 12th day of February, 1870, said Baierle was guilty of an act of bankruptcy, and on the 15th day of February. 1870, a petition was filed in this court to have him adjudged a bankrupt, and that in pursuance of said petition he afterwards was duly adjudicated a bankrupt; that on said 15th day of February, respondents caused a judgment to be entered in the Superior Court of Chicago by virtue of the warrant of attorney attached to said one thousand dollar note, upon which judgment execution was issued and levied on the same day upon certain personal property of said bankrupt, and the property so levied upon was subsequently sold on said execution, and said judgment, and costs, amounting in all to $1,068.72 was fully satisfied thereby. The petition also charges that at the time of the entry of said

judgment and the issue of execution, levy and satisfaction thereof, said respondents knew of Baierle's insolvency, and that by said judgment and levy said respondents obtained a preference over the other creditors of said bankrupt contrary to the tenor and intent of the bankrupt act. The petitioners then pray that said Niehoff & Co. may be ordered and adjudged to pay to them as such trustees, all said sums of money so wrongfully received and collected by them from said Baierle.

The respondents by their answer admit the making of said loan to said Baierle, and the receipt of said notes therefor, and the subsequent payment of said sums of $1,000 in November and January to apply on the first mentioned note, and the several extensions of said indebtedness, but they deny the extension of said $1,000 on the 12th of January, 1870, for sixty days, but aver that the same was only extended for the term of thirty days; they also denied all knowledge of Baierle's insolvency, and of any facts tending to apprise them of such insolvency at the time said payments were made and extensions granted. They also admit the entry of said judgment, issue of execution, levy and satisfaction thereof, but deny all knowledge of Baierle's insolvency and acts of bankruptcy at the time said judgment was entered. It was also set forth in the answer, and proved on the trial, that after the entry of said judgment said Baierle made his motion in the Superior Court to set aside said judgment, on the ground that said note had been extended sixty days from the 12th of January, 1870, and consequently was not due at the time said judgment was entered thereon, and that said motion was, after due consideration, overruled by said court.

The only question, except as to the time for which said $1,000 note was extended on the 12th of January, upon which proof was offered at the trial, was in regard to the knowledge or notice which Niehoff & Co. had of Baierle's insolvency during the progress of the transactions detailed.

The petitioners relied mainly upon the facts of the extensions obtained by Baierle, and the high rate of interest or discount paid to establish or raise a presumption of knowledge of said

insolvency, and the preference by the receipt of the discount, and the two sums of $1,000 each, which were paid in November and January on the $5,000 note; while on the part of the respondents it was proved by several business men who had transactions with Baierle up to a few days before the commission of the act of bankruptcy, that he was engaged in extensive operations in this city as a distiller, rectifier and saloon keeper, and was in unquestioned credit with bankers and merchants; that he had a large amount of property in his hands, and was apparently in prosperous circumstances. It was also proved that at the time Baierle paid the $1,000 and obtained the extension on the $5,000 note in November, he explained to respondents that one Golson had agreed to go into partnership with him and furnish money for the business on which he depended, but that Golson changed his mind, and at the time of the payment of $1,000 in January Baierle stated that the market for highwines was dull, and he preferred to hold them awhile for better prices, and that he was feeding cattle at his distillery which would be better ready for market and more in demand in sixty days.

Adolph Moses, for petitioners.

Hoyne, Horton & Hoyne, for respondents.

BLODGETT, J.—In the light of this evidence I do not think respondents chargeable with knowledge of Baierle's insolvency at the time of these extensions, nor with such notice of facts touching his probable insolvency, as should be held sufficient to put a cautious man on inquiry. Baierle's credit was good among those with whom he dealt during all these transactions; that a man engaged in extensive commercial transactions should need extensions or renewals of his commercial paper is no unusual circumstance, and the fact that two responsible citizens were willing to answer as sureties for him shows the estimate in which he was held by them in regard to solvency.

The reasons, too, which he assigned for asking the two last extensions were natural, and there is no dispute as to the

existence of those reasons; in fact, a failure in an arrangement for partnership in so complicated a business as Baierle was then carrying on might make an extension necessary for the most solvent man, while the condition of the market for the product of his manufacturing business was certainly an adequate reason for continuing his loan in January, rather than to have sold the highwines and beef at a sacrifice, to pay them.

Again, our examination of the proofs of debt against the estate of the bankrupt shows that considerable more than half of those debts were contracted between the time these extensions were obtained and the acts of bankruptcy. This fact proves conclusively that Baierle was, at this time, in the full enjoyment of unlimited credit in the community with whom he dealt and where he resided. The proof shows that the rate of discount paid was not unusual at the time, but that, on the contrary, the best commercial paper in this city was then in the market at those rates, thus rebutting any presumption or inference of insolvency from the payment of the discount alleged.

I think, therefore, that the petitioners' proof fails in a most essential particular, as to the claim to recover back the $2,000, and sums paid by way of discount or interest.

In regard to the preference obtained by the entry and collection of the judgment on the $1,000 note, the proof is that on or about the 12th day of February, 1870, Baierle was missing, and various rumors were afloat in the community in regard to him—by some he was supposed to have been murdered, while others supposed he had absconded with a large sum of money for the purpose of defrauding his creditors—and these rumors were to some extent the subject of articles and notices in the newspapers published in this city. Niehoff, one of the respondents, testifies that he heard something of these rumors, but did not hear that Baierle was insolvent; that Hoffman, who was surety on one of the notes, talked with him as to what steps he, Niehoff, would take to protect the sureties on the paper he held, and it was finally concluded that judg-

ment could be entered on the one thousand dollar note, which was accordingly done on the morning of the 15th of February, about 10 o'clock, and the levy made on the execution the same morning, and before the petition in bankruptcy was filed. It is true Niehoff denies all actual knowledge or information, at the time the judgment was entered, of Baierle's insolvency, but it is clear, from the evidence, that he knew something of the extraordinary rumors afloat in regard to Baierle's being missing, or having absconded; and so much discussion of his affairs seems to have transpired as to lead to the conclusion that the safety of the surety on the note, if not the interest of Niehoff & Co., required that the power to enter judgment on the warrant of attorney should be called into execution. Niehoff says himself, in his evidence, that at the time of the entry of the judgment he "thought something was wrong with Baierle." He evidently did not suppose him dead, as one rumor had it, for he would not have entered judgment against a dead man, and the "something wrong" evidently referred to Baierle's pecuniary affairs, or there would not have been this consultation with sureties, and final conclusion of counsel to enter up a judgment on this note. The proof also shows that Troost, who is a member of the firm of Niehoff & Co., participated in these discussions in regard to Baierle's absence, and the course to be pursued in order to secure the debts the firm held against him, and it would seem from the proof that this judgment was entered after consultation between Troost and Grater, the surety.

Within a few hours of the entry of this judgment, the records of this court, of which all persons in the district are bound to take notice, contained ample evidence of Baierle's insolvency and acts of bankruptcy, and from the time of the filing of the petition in bankruptcy the respondents are chargeable with full knowledge of Baierle's insolvency. At the time when the satisfaction of this judgment was actually obtained by the sale of the property levied upon, Niehoff & Co. were certainly informed of all the facts necessary to advise them of Baierle's insolvent condition.

The 35th and 39th sections of the bankrupt act make void all transactions by which one creditor, with the knowledge of the debtor's insolvency, and with the assent of the debtor, obtains a preference as against the other creditors, and the question arises as to whether this is such a preference as is prohibited by these sections.

In considering these questions the first inquiry is as to when the preference by means of a judgment note is obtained—is it when the note, with a warrant of attorney to confess judgment, is executed and delivered? Clearly not, because the power lies dormant, and in most cases secret, until it is executed by the entry of the judgment. Up to this time the warrant to confess judgment is only an evidence of the debt, and gives the creditor no lien, and, consequently, no preference. It may be of itself an act of bankruptcy, under the law, to give a warrant of attorney to confess judgment, but not necessarily a preference. The warrant of attorney, in fact, is only a means placed in the hands of a creditor by which he may, more promptly than other creditors, seize the property of the debtor on legal process, and only becomes dangerous when used to the detriment of other creditors. It would seem to follow, then, that if a creditor holding a warrant to confess a judgment against a debtor, causes the power thus entrusted to him to be exercised after he has notice of the debtor's insolvency, or has notice of such facts as make it reasonable to believe the debtor is insolvent, and takes his judgment and levies upon the property of the debtor with such knowledge or notice, he is guilty of intending a fraud upon the bankrupt act.

The consequences of his acts are to secure a preference over other creditors, and if he obtains such preference with notice of the debtor's insolvency, he is liable to an action by the assignee for the recovery of the property thus obtained, or its value. The warrant of attorney is a continuing consent on the part of the debtor to the entry of the judgment by the creditor, and if when the creditor executes the power thus delegated, he knows the debtor to be insolvent, the judgment

and execution under it is manifestly an act of bankruptcy, participated in by the creditor to such an extent as to make void all advantages obtained thereunder. It will not do to say that because the creditor had no knowledge of the debtor's insolvency at the time he obtained the warrant of attorney, and that the same was given to secure a *bona fide* debt, therefore all he does under the warrant ot attorney must be sustained. As I said before, the warrant to confess judgment lies dormant until the creditor sees fit to act upon it, and whether his action shall result in such an unlawful preference as will make the creditor liable to the assignee depends upon the knowledge or information the creditor had in regard to the debtor's insolvency at the time he made his warrant of attorney operative. Applying these principles to the case before me, I think the proof shows Niehoff & Co., at the time they entered their judgment against Baierle, had knowledge of such facts as gave them reasonable cause to doubt Baierle's solvency, which is equivalent to having cause to believe him insolvent. They thought "something was wrong with him," and this, evidently, had reference to his pecuniary affairs, for the action in question was taken to save the surety, Grater, and perhaps partly in his interest. Baierle, it will be remembered, was missing on the 12th of February, 1870, which was Friday, and it can hardly be possible that, with the large number of creditors, and other persons who were more or less affected by the occurrence, there should not have been a comparison and discussion by those most interested, in regard to his financial embarrassment, which must have reached the ears of the respondents, and contributed to hasten their action upon this warrant of attorney.

I therefore conclude that the judgment entered in this case was entered at a time when the respondents had reasonable cause to believe the bankrupt insolvent, and therefore with intent to evade that provision of the bankrupt act which prohibits and makes void all preferences.

Let there be a decree entered for the amount of the execution collected, with six per cent. interest.

Motion for new trial by respondent overruled by court.

Consult *In re Weeks*, *ante p.* 259; *In re Eldridge*, *ante p.* 362; *Campbell, Assignee, &c., vs. Traders' National Bank*, *ante*, p. 423; and numerous authorities there cited. [*Reporter*.

IRWIN vs. DANE.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—FEBRUARY, 1871.

IN EQUITY.

PRELIMINARY INJUNCTION.—WHEN GRANTED.

1. The same rule obtains in patent cases as in other equitable cases; the granting of a preliminary injunction is a matter of judicial discretion, to be determined by the circumstances under which the case is presented.

2. It is proper to grant an injunction where much more injury would or might result to the complainants from a refusal than to the defendants from granting it.

3. Where the defendants had very little invested and no substantial damages would accrue to them, if enjoined, while they might seriously injure the complainant's business by competition, an injunction should be granted.

4. Although a patent case is not like a suit upon a trade-mark, yet the standing of the complainants in the market and their relation to the trade are matters of value, and may pertain so intimately to their patent as to be proper for consideration on a motion for a preliminary injunction.

Motion for a provisional injunction to restrain the defendants from infringing five letters patent for "improvements in lamps, lanterns and lamp-burners," granted John H. Irwin: May 28, 1867; January 7, 1868; February 2, 1869; May 4, 1869; and February 1, 1870, and assigned to complainants.

The claims of these several patents were as follows:

Patent of May 28, 1867:

1. "In combination with the lamp or its burner, the tube D, or its equivalent, arranged and operating substantially as and for the purpose specified.

2. "In combination with said tube a cooler E, arranged so as to operate substantially as described."

Patent of January 7, 1868:

"In combination with a burner of a lamp and a globe or protector thereof, one or more tubes or passages D, or their equivalents, arranged so as to operate substantially as specified and described."

Patent of February 2, 1869:

1. "The arrangement beneath the funnel plate E of the prolonged tube D, and one or more flanges 5, arranged substantially as and for the purposes set forth.

2. "In combination with the ring F, funnel plate E, and tube D, a spring S arranged to operate in the manner and for the purposes specified."

Patent May 4, 1869:

1. "The combination of the concave plate I, ring G, or its equivalent, tubes H and F, and the base A, B, of the lantern substantially in the manner specified and shown.

2. "The combination of the globe G, concave plate I, tubes H and F and base A and B, of the lantern, arranged and operating substantially as and for the purposes shown and set forth.

3. "The combination of the plate I, tubes F, flange T, upon the top of the wick-tube, and the globe G arranged to operate as set forth.

4. "The combination of the perforated plate E, plate I, tubes H, F, and the base A, B, of the lantern, arranged to operate as described and for the purposes set forth."

Patent of February 1, 1870:

1. "The air-chamber or space B, in combination with the air-tubes C, when said tubes are inserted in the top of said chamber, as and for the purpose specified.

2. "The thumb-piece I. in combination with the globe-holder F, when constructed and arranged substantially as and for the purposes described."

L. L. Coburn, *S. A. Goodwin* and *Grant Goodrich*, for complainants.

West & Bond, for defendants.

BLODGETT, J.—This was a motion for a preliminary injunction made by the complainants against the defendants, to restrain the defendants from the use of certain patents which were granted originally to Irwin. By assignment, his co-complainants have acquired an interest in these patents which are

the subject-matter of the complaint. The only doubt I have had in reference to the matter was as to whether it was a proper case for an injunction under the points made by the defendant's counsel, but I am satisfied that the same rule really obtains in patent cases as in other equitable cases. The granting of a preliminary injunction is a matter of judicial discretion, to be determined by the circumstances under which the case is presented, and inasmuch as in this case I think that much more injury would or might result to the complainants from a refusal of the injunction than to the defendants by granting it, I have concluded to grant it.

The aspect of the case is simply and briefly this: The complainants are the owners of patents, and are manufacturing under them; have entered upon the manufacture of the patented articles largely, and been engaged in it for over three years. The defendants had, just prior to the commencement of this suit, also entered upon the manufacture of the competing article; but, according to the proofs, have invested very little money in it, had acquired no reputation for their manufacture in that line, although in other branches of their business they are largely engaged.

I think they can better afford to await the issue of the controversy here, than even to take the chances of the result of a trial, and perhaps be called on to respond in damages. They are in such condition that they can remain still until the termination of the litigation, which should, however, be prosecuted with all possible dispatch.

They have very little invested, and no substantial damages, perhaps, would accrue to them in case the determination of the suit should be against them; while if they were to go on with the business as competitors they might seriously injure the complainants' business, and in the end perhaps not be able to respond in damages, and there might be a class of damages for which the complainants could not be entirely compensated, because the complainants are manufacturers, and while this is not, as has been said, a trade-mark case, yet their standing in the market and their relations to the trade are matters of

value to them, and pertain so intimately to their patent that the two interests cannot be separated.

As to the last patent on the burner, I should not grant an injunction upon that if it stood alone, but as it is so intimately blended with the complainants' other patents and manufactures, I am not disposed, for the purpose of this preliminary motion, to separate them. I shall grant the injunction as prayed. I make my statement thus briefly in the case, because I no not think on a preliminary hearing the court should commit itself so definitely in regard to the validity of the patent as to prejudice the hearing. It is better always to reserve all final conclusions and determination until all the testimony is in and the case is finally heard.

I say this, as I do not wish counsel to understand that I foreclose them on any point by this decision, but the case, as presented to me, shows a *prima facie* case of infringement.

SECURITY INSURANCE COMPANY vs. TAYLOR.

DISTRICT COURT.—NORTHERN DISTRICT OF ILLINOIS.—FEBRUARY 1871.

JURISDICTION OVER EXECUTOR.

1. An executor cannot be compelled to appear and answer in a state where he has not taken out letters testamentary, nor done any official act.
2. His power and liability are local, and the fact that process is served upon him while within the jurisdiction of this Court, does not make him amenable to its process in his representative capacity.
3. A *scire facias* in this Court to bring in the executors of a Wisconsin estate, will be dismissed.

This was a demurrer to a plea in abatement to a *scire facias* to make the executors of the defendant, Emeline Taylor, parties to this proceeding.

The original proceeding was a libel *in personam* for a marine tort, filed by the libellant, The Security Insurance Company, against Emeline Taylor, executrix of Isaac Taylor, deceased; John Campbell and Hollingford Warfield alleging in substance that they were the owners of the steamer Geo. S. Weeks, a vessel of twenty tons burthen, duly licensed and enrolled, and plying upon the waters of the Mississippi river between the port of Red Wing, in the State of Minnesota, and Savannah, in the State of Illinois; that respondents, as the owners of said steamer, were guilty of negligence in the transportation of a cargo of wheat from Red Wing to Savannah, by which the libellants sustained great damages.

On the hearing an interlocutory order was entered in favor of the libellants, and reference made to one of the masters of this court to take testimony, and report as to the extent of the damages sustained. Exceptions were taken to the masters report, and a hearing had upon these exceptions.

Pending the decision upon that hearing, a suggestion was made of the death of the respondent, Emeline Taylor, and leave was taken to issue a *scire facias* to make her executors parties to the proceeding. That *scire facias* was served upon one Kelly, alleged to be one of the executors of Mrs. Taylor, who came in and pleaded in abatement to the *scire facias* that Emeline Taylor, during her lifetime, was domiciled in the State of Wisconsin, that her residence was there, that she died there, and her will was probated there, and had not been probated in the State of Illinois; that the the respondent Kelly is one of three executors named, and that they have proved the will in the county of Racine, in the State of Wisconsin, and are acting as such executors, under letters testamentary from the proper court of said county; that he was casually in the State of Illinois when served with process, and has never in any wise acted as executor within the jurisdiction of this state. To this plea libellants demurred.

Rae & Mitchell, for libellants.

Wm. F. Whitehouse, for respondent.

Blodgett, J.—It seems very clear to me that this *scire facias* cannot be sustained. The law is well settled that executors and administrators cannot act out of the jurisdiction in which they are appointed, except by complying with the statutory provisions made by comity in such exterior jurisdiction. For instance, an executor in another state may have ancillary administration in this state, for certain purposes, under the statutes of this state, by probating the will here; in which case the authorities of this state will respect his character as executor, and allow him to proceed, and sell or control such portion of the estate as lies within this jurisdiction. This rule, a rule of legislative inter-state comity, holds in nearly all the states, as far as my investigation has gone; but it does not in any way override, or otherwise compromise the general principle that the power of an executor or administrator is local. In this case the process of this court cannot

reach the administrators or executors of Emeline Taylor, unless they have made themselves executors within the jurisdiction of the court. This they have not done, and the mere fact that one of the executors came within the jurisdiction of the court upon other business, does not make him amenable to the process of this court in his representative capacity; his official mantle falls when he leaves the jurisdiction in which he was appointed. If persons having claims against the estate of Emeline Taylor wish to pursue their remedy here, they must either take out letters of administration against the estate in this jurisdiction, or procure the executors to probate the will within this state, before the courts of this state, either state or federal, can obtain jurisdiction *in personam* of the executors, or of the property of the decedent.

The demurrer to the plea in abatement will therefore be overruled; plea sustained, and *scire facias* dismissed.

Where an administrator sues as such, and he is a citizen of the same state as the defendant, the court has no jurisdiction, although the intestate was a citizen of another state. An administrator is in such case the real and not a nominal party. *Dodge, exr., vs. Perkins*, 4 Mason, 435.

That an executor cannot be sued in his official character in another state for assets received by him in the jurisdiction where he was appointed, see *Mellus vs. Thompson*, 1 Clifford, 125.

No action can be maintained against an executor or administrator, founded on a debt due from the estate of the deceased, unless he has been duly qualified by a probate tribunal in the state or county where the suit brought. *Caldwell vs. Harding*, 5 Blatchford, 501. [*Reporter*.

In re GRAHAM.

DISTRICT COURT.—WESTERN DISTRICT OF WISCONSIN.—FEBRUARY, 1871.

IN BANKRUPTCY.

1. EXEMPTIONS.—A family sewing machine is properly exempt under the 14th section of the Bankrupt Act.

2. A watch, not being exempt by the statute of the State, does not properly come within the discretionary articles contemplated by that section.

3. NONE IN PROPERTY FRAUDULENTLY CONVEYED.—In property conveyed by the bankrupt in fraud of creditors prior to the filing of the petition against him, and afterwards recovered to the estate, he cannot claim any exemptions. The sale is good as against him. In attempting to place his property beyond the reach of his creditors he has placed his exemptions beyond his own reach.

4. In the list of exemptions the value of the articles set apart should be stated, so that it may be seen whether they come within the limitations of the act.

Petition by the bankrupt for an order directing the assignee to add to the list of exempt property set off to him, one family sewing machine, one silver watch, one single sleigh, one harness, one manufacturer's sewing machine, one horse and one buggy.

S. J. Todd, for assignee.

A. L. Sanborn, for bankrupt.

HOPKINS, J.—I think that the family sewing machine is exempt, and the assignee should set it off to the bankrupt. Sec. 1, ch. 192, Laws of Wisconsin, 1860.

The watch is not exempt by the state law, and does not properly come within the discretionary articles contemplated by section 14 of the bankrupt act.

The bankrupt, it appears, had disposed of the sleigh, harness,

and manufacturers' sewing machine to one Hanlon, before the filing of the petition in this case, and it was not claimed that he had re-purchased them, so that he clearly has no right to them.

The bankrupt, about the 12th of September, 1870, sold all his stock in trade and tools as a harness maker, three horses, three buggies, and a lot of cattle and other property, to one Hanlon, at the price of $3,684, for which he took his notes in equal amounts at one, two and three years. A detailed bill of sale was made of the articles and price of each, in which the manufacturer's sewing machine was valued at $100, netting machine $300, and other tools $175, in all $575, all of which he now claims as exempt as mechanic's tools. By the state statute a mechanic's exemptions of tools is limited to $200 in value, so that if there was no question as to his right to the exemption to the amount allowed by the statute, he would not be entitled to the netting machine, for that alone exceeds in value the amount allowed; nor would he be entitled to the sewing machine, unless he gave up about $75 worth of his other tools, for together they exceed the statute allowance by that sum.

But I think the proof clearly shows that these articles were all sold by the bankrupt to Hanlon before filing the petition in bankruptcy, and he is not, therefore, entitled to them, whether exempt or not.

That sale was unquestionably made to hinder and delay creditors, and was void, but the bankrupt is not permitted to impeach it; the sale as to him is good, and by it he parted irrevocably with all his interest in the property covered by the bill of sale.

The bankrupt claims that he bought back the horses, buggies and cattle before the filing of the petition in bankruptcy, or that the trade, so far as they were concerned, was abandoned, and that he allowed $1,600 upon the note for the purchase price. These articles were sold to Hanlon for $1,195, and why he should have taken them back at $1,600 is not explained.

The re-sale of this property is attempted to be sustained by

Graham's and Hanlon's testimony taken before the Register. They agree as to the terms and circumstances of the sale, and show the transaction to have been a gross fraud upon the creditors.

They agree substantially, also, as to the fact of the re-sale, but no explanation is given of the discrepancy between the price they were sold for, and taken back at on the day following the sale; their notes are not produced to show whether they were indorsed or not, and Hanlon swears that he told the marshal and one Dewey the day he took the property that the horse was his.

After a careful examination of their testimony I am forced to the conclusion that the part relating to the re-sale of the property (and in which was included the horse and buggy) is not entitled to credit, and is not true. The property was found in the possession of Hanlon by the marshal, and he claimed to own it then under his fraudulent purchase.

They had no doubt conspired together to place the possession and apparent title to it in Hanlon, to defraud Graham's creditors, and were in the execution of that dishonest scheme when they were arrested by the proceedings of this court. And if the bankrupt has by his fraudulent acts deprived himself of the benefit of the exemption laws, it is a just retribution upon him. A debtor not unfrequently cheats himself in trying to cheat his creditors, and this bankrupt furnishes a striking example of such a case. In his anxiety to place his property beyond the reach of his creditors, he placed his exemptions beyond his own reach.

I therefore deny the prayer of the petitioner, so far as he asks to have the assignee set off the horse, buggy, harness, sleigh, watch and manufacturer's sewing machine as exempt to him, but direct that the assignee set off to him the family sewing machine, as prayed.

I also direct the assignee to strike out of the list of exemptions the "tools as harness maker, including netting machine, straw cutter, and miscellaneous tools," for the reasons:

First. That their value is not stated as required by the

19th general order in bankruptcy, so that it can be seen whether the articles embraced in that designation exceed in value $200; and

Second. That the evidence clearly satisfies me that the bankrupt had parted with all his interest in them before the commencement of these proceedings, and that they are not now, and were not then, his property, but as between him and Hanlon, they belonged to Hanlon; that the creditors alone can impeach the title of Hanlon for the fraud. The bankrupt cannot. The assignee will correct the list of exemptions in conformity with this opinion, and file the same without delay.

That a bankrupt cannot claim as exempt, property conveyed by him in fraud of his creditors and recovered by the assignee, see also *Keating vs. Keefe* 5 Bankrupt Register, 133. [*Reporter*.

UNITED STATES vs. FOSTER.

CIRCUIT COURT.—EASTERN DISTRICT OF WISCONSIN—FEBRUARY TERM, 1871.

REVENUE LAWS.

1. To an information against a brewer filed under the 48th, 49th, 51st and 53d sections of the Act of July 13, 1866, it is not a sufficient answer that the neglect to keep the prescribed books and accounts was through ignorance or carelessness, and that there was no wrongful or criminal intent.

2. The object of the law is to protect the Government in the collection of the tax. The penalty is for the omission, and the very nature of this business demanded that the brewer should know his duty in the premises.

3. Nor is it a sufficient answer or excuse that he misconstrued the law, and drew erroneous inferences as to his rights.

4. Where the law prescribes as punishment for an offense both a money penalty and imprisonment, it is not true that the penalty can only be enforced by indictment. The Government can maintain an action of debt for the money penalty.

5. The words "shall be liable to," &c., are permissive, and not compulsory; they mark the extreme limit of the penalty, and leave it discretionary whether the whole penalty shall be imposed.

This was an information as in a declaration in debt under the 48th, 49th, 51st and 53d sections of the internal revenue act of July 13th, 1866.[1]

The declaration contained two counts.

The first alleged that the defendant was the owner and superintendent of a brewery at a place named, within the district, and that he did not keep books showing the amount of beer which he had manufactured and sold, and showing the amount of materials which he had purchased, and claimed the penalty of three hundred dollars, prescribed in the last clause of the 51st section.

The second count was that the defendant did not pay the taxes on the beer sold in fractional parts of a barrel, and that they were removed without stamps being affixed, and five

[1] 14 U. S. Statutes at Large, 163.

instances were charged and a penalty of one hundred dollars claimed in each case, under the last clause of the 53d section.

The jury found a verdict for the United States, for the penalty claimed.

Motion for a new trial and in arrest of judgment, on the ground that the verdict of the jury could not be sustained under the evidence, and because, under the law, the judgment could not be rendered under the verdict.

Levi Hubbell, U. S. District Attorney, for the United States.

Smith & Stark, for defendant.

DRUMMOND, J.—There was an allegation in the first count showing that an offense had been committed under the first part of the 51st section, but the whole of the first count was in debt, and only claimed as a penalty the sum of three hundred dollars. The case did not show that the defendant had any wrongful or criminal intent in neglecting to keep the books as prescribed by the 49th section, but that he omitted to keep the books through carelessness or ignorance, and it is objected that in order to warrant the enforcement of the penalty against the defendant it is necessary that there should be some wrongful or criminal intent. This does not seem to be necessary in the law. The language of the law is, that a party shall forfeit and pay the sum of three hundred dollars if he neglects to keep the books, without any reference whatever to the motive which causes such neglect. It is for the act of omission. The object of the law is to protect the Government in the collection of the proper tax from the brewer, and in order to accomplish this there devolves upon him the duty of entering, or causing to be entered, from day to day in a book to be kept by him for that purpose the account of fermented liquors, the description of packages and the number of barrels and fractional parts of barrels manufactured, and also the quantity sold or removed for consumption or sale, and an account of the materials purchased by him. It may be that a party would not be subject to the penalty for an unintentional error or mistake in making

the entries, but the very object of the law was to compel the brewer to keep the books and to make the entries as heretofore stated, and it is no answer to the allegation that he has neglected or failed to do so, that he was ignorant of the requirements of the law. The very nature of his business demanded that he should know what his duty was in the premises, and the old and familiar principle so often cited must be considered applicable to this case, that he cannot be excused on account of his ignorance.

The allegation made in the first count of the declaration under the first part of the 51st section seems to be mere surplusage, as no penalty is claimed under that allegation and may therefore be rejected, the count not being framed to enforce the penal part of the law.

The proof under the second count shows that the defendant in several instances had not affixed to the fractional parts of the barrels the stamps as required by the 48th section. There was some evidence tending to show that the defendant was under the impression that he might divide the stamps, putting one part of the same stamp on one fractional part of a barrel, and another on a different fractional part of a barrel, contrary to the provisions of the law. The same rule is applicable here as in relation to the first count. The law is explicit on the subject and a defendant cannot protect himself under an erroneous inference which he drew as to his right to affix stamps, and it is not necessary in this count any more than under the first that what the defendant did should have been done with a wrongful or criminal intent. It is enough that he failed or neglected to do what the law required.

It is insisted that the penalty referred to in the last clause of the 53d section, can only be imposed by indictment, and that it is not competent for the prosecution to institute an action of debt for a violation of this part of the law, where a person refuses or neglects to affix and cancel a stamp required by law. The language of the clause is "that a person who neglects or refuses to affix and cancel a stamp shall be liable to pay a penalty of one hundred dollars in each case where such omission

occurs and shall be liable to imprisonment for not more than one year," and it is urged that because the party is subject to imprisonment the penalty can only be enforced by indictment. The general rule, where a money penalty is imposed for the doing or omission to do a particular act, is that an action of debt can be maintained, and the only question is, whether, when imprisonment is added to the money penalty, the Government thereby loses the right to maintain the action of debt. In this case the Government proceeded only for the money penalty named in the 53d section and has waived the other penalty of imprisonment. There may be a question whether, when the action of debt is brought, any indictment could afterwards be maintained. Without deciding that question, I am of the opinion that the action of debt well lies in this case. The language of the law, it will be seen, is peculiar: "shall be liable" to pay the penalty of one hundred dollars, and shall be liable to imprisonment. The language of the law is not imperative, but permissive, and in looking through the internal revenue laws upon the subject of penalties, it will be observed that the language varies in different cases. Sometimes the law speaks imperatively, as that the party guilty of the offense, or performing or not performing the act, shall suffer in a particular way by a penalty or by imprisonment. In other cases the law speaks in a permissive form, as that the party may be subject or liable to a particular penalty, and it would seem as though there was some object in this different phraseology of the law. For example, where the law made it compulsory on the court to impose the penalty, there the court could not vary from the demands of the law. But where the law only declared that the party might be liable to such a penalty named, and might be liable to imprisonment, there the language of the law does not seem to make it compulsory upon the court to include both. It would seem, in such case, to be a matter within the sound discretion of the court.

Motion for new trial and in arrest of judgment overruled.

BROWN vs. SELBY

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—FEBRUARY, 1871

IN EQUITY.

1. RE-ISSUES—ONLY FOR ORIGINAL INVENTION.—A re-issue can only be for the invention originally made, and intended to be described or claimed, and included in the original patent.

2. EACH PART SHOULD STAND SEPARATELY.—It would seem to be a sound principle, when, on a re-issue at the desire of the patentee, several patents are issued, under section 5 of the act of 1837, for distinct and separate parts of the thing patented, that each part covered by each patent should stand by itself as an invention.

3. IMPROVEMENTS.—Where the patentee is not the inventor of the original machine, but is a mere improver, his claims must be construed under the guidance of that leading fact.

4. It is a fundamental rule that if a man merely improves a machine, he should clearly disclose to the public in his specifications what is new in his invention.

5. Vague and sweeping claims of entire machines, where a patentee has only improved a part, ought not to be encouraged.

6. SEAT UPON PLANTER.—A claim for the form and location of a seat upon a machine might stand if there was any change or modification of the parts by which a seat was obtained, but only under special circumstances. If the claim be only for mounting the attendant in such a position that he may overlook the work, it cannot stand, unless the mode and manner of the position be pointed out, and is the subject of invention.

7. The claims of the ten re-issues of the patents issued to George W. Brown for "improvements in seed planters" in 1853 and 1855, examined, construed and limited.

8. Brown was not the inventor of the runner for seed or corn planters, nor the first to mount the attendant upon the machine.

This was a bill in equity to restrain the defendants from infringing letters patent for "an improvement in seed planters," granted to complainant August 2, 1853, antedated February 2, 1853, re-issued February 16, 1858, and again

re-issued September 11, 1860, in five divisions, numbered 1,036, 1,037, 1,038, 1,039, 1,040; and also letters patent for "an improvement in seed planters," granted to complainant May 8, 1855, re-issued November 10, 1857, and again re-issued December 11, 1860, in five divisions, 1,091, 1,092, 1,093, 1,094, 1,095.

The inventions set forth in these various patents related to machines known as "corn planters," and are sufficiently indicated by the claims.

The claims of these several patents were as follows:

Original patent of 1853:

"The oscillating horizontal wheels or distributors, in the bottom of the hoppers, having slots and holes of various sizes in combination with stationary cups and pin, for the discharge of different kinds and quantities of seeds; also the arrangement of the covering rollers, mounted as described, and performing the purpose of covering the seed, elevating the cutters in turning around, and in adjusting them to different depths."

Re-issue of 1858:

"I claim a shoe for opening a furrow, which has a convex edge in front and a seed tube in the rear end, so that it may cut through any grass, open a furrow and hold it open until the seeds are deposited in it, substantially as herein set forth."

Re-issue No. 1036:

"I claim a seed planting machine, constructed principally of frame-work, the front part of which is supported on not less than two runners or shoes with upward inclining edges, and the rear part supported on not less than two wheels, the latter being arranged so as to follow the former, substantially as and for the purpose set forth."

Re-issue No. 1,037:

"I claim the construction of a shoe or runner for seed planting machines, with an upward inclining edge, and its point sufficiently high or raised so that it will climb up and over, or cut or break through, intervening obstacles without materially forcing the earth laterally at its front part, and widening toward the rear end, so as to open out a gash or furrow, in which the seed to be planted may be deposited, and long enough to furnish a support to the frame-work, substantially as described."

Re-issue No. 1,038:

"I claim, in combination with a seed planting machine, constructed principally of frame-work, with not less than two runners, and no less than two wheels, a hinged joint between the point of the tongue and with the rear part of the machine, so that one part of the frame-work may be raised, lowered, adjusted or supported on the other part, substantially as described."

Re-issue No. 1,039:

"I claim a seed planting machine, wherein the seed dropping mechanism is operated by hand or by an attendant, in contradistinction from "mechanical dropping," the mounting of such attendant in such position that he may readily see the previously made marks upon the ground, and operating the dropping mechanism to conform thereto, substantially as set forth.

"I also claim, in combination with a seed planting machine, composed substantially of frame work, and upon which the person who works the seed slides or valves sits or stands, a lever or its equivalent, by which a driver or second attendant may raise or lower that part of the frame-work which carries the attendant and the seed devices, and thus ease the machine in passing over intervening obstacles or in turning around, substantially as described."

Re-issue No. 1,040:

"I claim, in combination with a seed planting machine, carried mainly by, or supported mainly upon, not less than two runners and two covering wheels, a pair of auxiliary wheels and an axle, for the double purpose of taking a portion of the weight off from said runners and covering wheels, and for affording the means of readily converting the machine from a hand planter to an automatic seed sower, substantially as described

"I also claim having the axle of the auxiliary wheels in hinged or adjustable arms or levers, so that more or less of the weight of the machine may be placed upon said auxiliary wheels, substantially as described,"

Original patent of 1855:

"In combination with the hoppers and their semi-rotating plates, D, the runners, A, with their valves, F, and their adjustment by means of the levers and cams, and the driver's weight, for the purpose of carrying and dropping seeds by each vibration of the lever, D, and to regulate the depth of the planting, as described.

Re-issue of 1857:

"What I claim is in combination with the hinged frames or hinge joint, the locating of the conductor's or driver's seat in rear of the supporting axle, so that as he moves forward or back in his seat, the rear frame may act as a lever for lowering or raising the seeding part of the machine, and thus throw it into or out of the ground, as circumstances may require, in turning around or for passing over any obstruction, substantially as set forth."

Re-issue No. 1,091:

"I claim, in combination with a seed planting machine that is operated by hand, the placing of both the driver and the person who operates the seed slides or valves, upon the machine in such position as that each may attend to his particular duty without interfering with that of the other, substantially as described.

"I also claim, in combination with a seed planting machine that is operated by hand, and upon which the driver and the person who works

the seed slides or valves sit or stand, the so locating of said seats or stands as that the weight of one of the persons may be used to counterbalance or overbalance the weight of the other, for the purpose of more readily raising or lowering the seeding apparatus, substantially as and for the purpose described."

Re-issue No. 1,092:

"I claim, in combination with a seed planting machine operated by hand, and having its seed device forward of the center of the wheels and forward of the driver's seat and a hinged connection, the locating the seat in such relation to a line drawn through the center of the wheels or ground supports as that the occupant of such seat may, by moving himself or throwing his weight backward or forward on his seat, without the necessity of rising, walking or standing, over or near the seeding devices, force the seeding apparatus into or raise it from the ground, substantially as described."

Re-issue No. 1,093:

"I claim, in combination with a seed planting machine that has a hinged or yielding point between its fixed points of support, and with its seeding devices between said points the so connecting of the parts between said fixed points of support, as that that portion of the machine carrying the seeding devices may be raised up out of the ground by the attendant riding upon the machine, and be carried by the tongue or horses' necks and the supporting wheel, substantially as and for the purposes described."

Re-issue No. 1,094:

"I claim, in combination with a seed planting machine, so as the forward part can be raised up on the supporting wheels and there carried, a lock, block or stop, B, which prevents the rear part of the frame from descending so low as to strike the ground or inconvenience the occupant of the seat upon said rear portion of the frame, substantially as and for the purpose described."

Re-issue No. 1,095:

"I claim so combining with a lever, by which both may be operated, a valve or slide in the seed hopper and a valve in the seed tube, as that a half motion of the lever by the operator riding on the machine, by which they are operated, shall both open and close the seed passages at regular periods, and pass measured quantities only, substantially as described."

S. A. Goodwin and *George Harding*, for complainant.

J. H. Roberts, *H. F. Waite* and *S. S. Fisher*, for defendants.

DRUMMOND, J.—This and three other cases were argued together, and as one of the cases was pending in the Southern District the argument was heard by Judge Treat and myself. They have been argued with great ability, and every con-

sideration urged which could influence the judgment of the court. They involve substantially the same questions and will be decided together. They relate to various patents for a corn planting machine issued to the plaintiff and to the defendants (for all claim to be manufacturing machines under the protection of patents), but the controversy turns mainly upon the validity and effect of several patents issued to the plaintiff George W. Brown. In order properly to appreciate the position of the plaintiff, as well as to give a sound construction to his numerous patents, it is necessary to state briefly what was done by him, and the action of the Patent Office on his applications. The ten patents of the plaintiff consist of two series—the offshoots of only two patents, one issued in 1853, the other in 1855. In his first specification he declared his invention to be a new and useful improvement in seed-planters, and he made two claims only. The first was for an apparatus in the hoppers for the purpose of discharging seeds. The second was for a special arrangement of the rollers, for the purpose of covering the seed, elevating the cutters in turning around, and adjusting the same. This patent was surrendered and re-issued in 1858, on the ground that there was an error or defect in the specifications or claims. The re-issued patent also contained two claims. The first was for a shoe or runner, of particular construction, and peforming special functions. The second was a joint, or hinge, in combination with the shoe, so that the latter might be raised or lowered. The apparatus in the hoppers and the covering rollers seem to have been forgotten or relinquished. In 1860, this last re-issue was again surrendered for the same reason and another re-issue taken out in five several divisions of distinct patents, for separate parts of the machine, numbered 1036, 1037, 1038, 1039 and 1040; the invention claimed in the patent of 1853, having blossomed out into many additional claims, some of them, apparently, not originally thought of by the inventor. These constitute the first series of patents, and all of them, except No. 1040, are more or less in controversy here.

The second series comes from the patent of 1855. In that

the plaintiff claimed in combination with the apparatus in the hoppers, a dropping apparatus in the runners, and the special adjustment by levers and cams, and the driver's weight, so as to drop seeds at each vibration of a lever and regulate the depth of the planting. In 1857 this was surrendered, and a re-issue obtained with the claim of locating the driver's seat in rear of the supporting axle, in combination with the hinged frames or joint, so that the movement of the driver forward or backward in his seat might cause the rear frame to act as a lever for raising or lowering the seeding part of the machine.

In 1860 this last re-issued patent was surrendered, and another re-issue obtained, containing five divisions — Nos. 1091, 1092, 1093, 1094, and 1095; several patents for distinct and separate parts of the thing patented in 1855. All of these are in controversy here.

A re-issue can only be for the invention originally made and intended to be described or claimed, and included in the original patent.

The language of section 13, of the act of 1836,[1] is that the "new patent is to be issued" for the same invention, "for which the original patent was granted." The object of the law is to enable the patentee to correct errors arising from "inadvertency, accident, or mistake."

It would also seem to be a sound principle that when, on a re-issue at the desire of the patentee, several patents are issued under section 5 of the act of 1837, for distinct and separate parts of the thing patented, each part covered by the patent should stand by itself as an invention.

Patent No. 1,036 of the first series is a claim for a seed planting machine constructed principally of frame-work, the front part of which is supported on not less than two runners or shoes with upward inclining edges, and the rear part supported on not less than two wheels, the latter being arranged to follow the former, substantially as and for the purpose set forth.

This is a claim for the whole machine, as described. The

[1] 5 U. S. Statutes at Large, p. 122.

parties do not agree as to the construction of this claim. The counsel for the plaintiff contend that it consists of a combination of two frames, connected by a jointed hinge, runners and rollers; although, as I understand them, they insist that the peculiar form and construction of one of the parts—*e. g.* the runners—are not a necessary part of the combination. The counsel for the defense contend that the claim consists of a combination of frame-work, runners and rollers. If, as the counsel for the plaintiff contend, this claim consists of the hinge joint, the runners, the rollers, and of two frames, and notwithstanding an essential change in one of the parts, there may still be an infringement, then it would seem to follow, if this claim is valid, that it in substance embraces in itself all the material parts of the corn planting machine. The evidence shows that rollers, runners and frames, and some mode of flexure, are all indispensable elements in every successful corn planting machine.

Many of these were devised and in operation before the plaintiff had modeled and made a successful machine, in 1851 or 1852, and, if all these parts are to be included in this claim, then it is clear there cannot be the qualification named, but there must be, on the contrary, a somewhat rigid limitation to the form and manner of the combination, otherwise all improvements in that direction would be suspended. A necessary conclusion from this would be that it must appear that defendants have used machines combining the parts of the plaintiff's machine, with their peculiar construction and mode of operation.

But it seems to me, in view of the history of the art, and of the facts as shown here, a claim put in such general terms as this, ought not to be permitted to stand. The plaintiff here substantially lays his hand on the corn planting machine entire. Has he any right to do this? I think not. The weight of the evidence is that he did not make an operating machine before the summer or fall of 1851. Prior to this, corn planting machines were used, with more or less success, containing runners, frames and rollers, similar to those the plaintiff

afterward put in his machine. Then consider the account which the plaintiff himself gave of his invention up to 1860. He stated clearly what parts of the machine he claimed. True, he is not bound by his claim if there was an error, but the error is not often in the omission to insist upon what the patentee has invented.

The plaintiff was not the inventor of the corn planter. He was at most but an improver of the machine, and his claims must be construed under the guidance of that leading fact. Having improved the corn planter, he should have stated in 1853 to the Patent Office what his improvement was. If he committed an error then, he should have corrected it in 1858, or at the latest in 1860. He had used in his machine the improvements of others. It was not fair to the public that he should use those improvements, and then say that he claimed them, as well as his own. I take it to be a fundamental rule in this class of cases, that if a man merely improves an agricultural implement, and seeks the protection of the patent law, he should clearly disclose to the public in his specifications what is new in his invention. These vague and sweeping claims of entire machines where the patentee has only improved a part, ought not to be encouraged. They lead to confusion and difficulties of various kinds. The very object of the patent law was to draw the line clear and distinct in this direction, as an act of justice both to the inventor and to the public.

Whether this construction of the claim is correct is not, perhaps, very material, because the separate claims remain to be considered, and I am of opinion, for reasons more fully stated hereafter, that this claim, even if it be regarded as a valid claim for the entire machine as described by the plaintiff, is not infringed by the defendants. With that construction the peculiar structure and connection of the parts of the machine made by the plaintiff should be most closely scrutinized, and to it they should be strictly confined. Only in this way could the claim be sustained.

Patent No. 1,037 is for the construction of a runner with an

upward inclining edge, so as to climb over, or cut or break through, obstacles, without materially forcing the earth in front laterally, so as to open a furrow for the deposit of the seed, and to furnish a support for the frame-work.

This claim is for a runner of peculiar form in a seed planting machine.

The plaintiff's counsel do not themselves entirely agree as to the construction of this claim. In order to be valid under one view of the evidence, it is insisted it is one of the parts of the elements of the hinged-joint machine. If it is one of the parts of the entire machine, as stated in the first claim, then it must be substantially limited to the form described. But I do not see how this claim can be supported, under the evidence, understanding it to be for the described runner in a seed planter. I prefer putting it on its substantial identity with the runners used in corn planting machines. Kirkman, Job Brown and Abbott anticipated the plaintiff in the construction of the runners. It is impossible to distinguish them in principle from that of the plaintiff. They opened a furrow to plant the seed. They climbed over, or cut or broke through obstacles with their rising inclined edge. They supported the frame. To the eye they are essentially the same. And as the plaintiff could not include the entire planting machine, because he did not specify the parts he invented; so he cannot claim a part of that machine invented by others, merely because his was in some respects constructed differently from theirs.

It may be added here that the plaintiff himself, in his evidence, says that all who use a runner similar to his infringe his claim, although there is testimony tending to show that he did not claim the runner in the patent of 1853, because others had used it before.

Patent No. 1,038 is for the hinged joint between the point of the tongue and the rear part of the machine, so that one part, by means of the joint, may be lowered, adjusted or supported on the other part.

To this claim, properly construed, I see no objection. But it cannot be understood to comprehend any kind of joint to

render flexible two frames. If so, it would be void, because joint hinges are old, and, indeed, would seem to be, if a mere hinge or joint, but a mechanical contrivance. The plaintiff's method of jointing the two frames is by bars, one on each side of the rollers, leading from the axle to the outside of each seed box, through which is a connecting rod. In the plaintiff's joint the horses make a point of bearing or support, and the rear frame thus becomes a lever, by which through the hinged joint the runner and seed part are raised or lowered.

It is in the nature of the case, therefore, that the claim of the plaintiff should be restricted to his peculiar mode of construction, and, that being so, the only question is whether the defendants use that particular jointed hinge. If the plaintiff, when he says it is immaterial where he hinges, means that he covers any method of hinging, then, as has been stated, the claim must fall. The plaintiff cannot be permitted in this way to put a stop to every other mode of hinging frames on a seed planter. The jointed hinge in Bergen's machine seems to be the nearest to the plaintiff's; but Bergen has two slotted joints on the sides of the frame, and a lever bar adjustable, and the horses' necks through the tongue are not a bearing point, and, in fact, Bergen has a patent for his own special hinged joint. In Haworth and Selby's machines the joint is at the forward part of the runner, and the support is in the wheels, and the peculiar structure of the joint apparatus is different. McGaffey's is jointed between the runners by collars fitting over a journal box, through which a shaft revolves automatically. The place of bearing seems to be nearly the same, but the mechanical construction is different. Limiting then the claim of the plaintiff in the manner stated, the defendants do not infringe.

Patent No. 1,039 consists of two claims, one the mounting of an attendant upon a hand-dropping seed planter, so that he may see the marks on the ground, and thus perform the check row planting; the other, a lever, by which another person may raise or lower the part of the frame-work that carries the attendant and the seeding device, and thus ease the machine in passing over obstacles, and in turning round.

The literal import of the first of these claims would seem to be for an effect or result, and, as such, could not be sustained; but perhaps for a special method in which the attendant is mounted, that is, the form and location of the seat, it might stand, provided there were anything in it which was the subject of invention, as if there was any such change or modification of the parts, by which a seat was obtained. The difficulty in this case is to see clearly what particular thing is claimed. What is the peculiarity of construction or arrangement of the seat which is patented? If it be only the mounting of an attendant in such a position that he may overlook the work, then it cannot stand, unless the mode and manner of the position is pointed out specially, and it can be seen that it may be the subject for a patent. It seems to me this claim is defective in these particulars. To put an attendant upon a planting machine was not the original device of the plaintiff. It had been done before by Kirkman, Job Brown, and others. All the defendants mount the dropper upon the machine, so as to overlook the check row marks, and I see nothing in this claim, or its specifications, to prevent it. Many of the observations heretofore made apply to this claim. As to the lever, all that has ever been said of the hinged joint applies here. Construed to be the peculiar structure set forth by the plaintiff, and it is only in that way it can be sustained, the defendants do not infringe.

In discussing the patents of the second series, re-issues of the patent of 1855, much less need be said.

Patents Nos. 1,091 and 1,092 are for placing the driver and planter on the machine, so that each may attend to his duty without interference with the other; the locating the seats so that the weight of one may counterbalance or overbalance the weight of the other; the location of the seat, so that the occupant, by changing his position thereon, may raise or depress the seeding apparatus.

As to the first claim, the remarks made upon the first claim under patent 1,039 of the first series, are applicable. As to the second, the proof shows the plaintiff does not accomplish

by his device the result he claims—overbalancing the dropper's weight by the driver's. As to the third, the long seat, the defendants do not use it, and besides, as in the last case, in practical operation it does not accomplish the result stated. Whenever the seeding apparatus is to be raised the driver always gets off, and this is true of all the machines—plaintiff's as well as defendants'.

Patent No, 1,093 is for so connecting the parts between the fixed points of support that the seeding apparatus may be raised up out of the ground, and carried by the tongue or horses' necks and the supporting wheels.

If it be admitted that this claim can stand, as not being a result, then it must be limited to the particular method pointed out in the specification, and it approaches very near, if it is not substantially included in, some previous claims. However all this may be, restricting it in a proper manner, the defendants do not infringe, for the reasons stated when considering the claims for the hinged joints in the former series.

Patent No. 1,094 is for the lock, stop or block on the outer side of the seed hoppers, in order that the rear frame may be prevented from descending so as to strike the ground. The defendants do not use this device.

Patent No. 1,095 is for the combination of a lever with the valve in the seed hopper, and a valve in the seed tube, so that a half motion of the operator shall open and close the seed passages at regular periods, and pass measured quantities of corn only.

It is insisted now that the plaintiff invented this device in 1852. I think the testimony establishes that this invention was made a year or two later, and after those of Case and Finn, Finn's being in the summer or fall of 1851, and that of Case in February of 1853. In Finn's machine it required two motions of the lever to plant the hill. Case, by means of a spring or weighted lever, planted the hill by one motion. It is established that the plaintiff, when sued in this court in 1860 by Case, for an infringement of his patent, insisted, and proclaimed through the public press, that the double dropping principle was public property.

The plaintiff certainly used this device as early as 1854, and it appears in his model and specifications in 1855, but he made no claim to it; neither did he in the re-issue of 1857, but in 1860, in the second re-issue of the second series, he puts in a claim to it. If it be conceded that, under these circumstances, he is not estopped from setting up this claim—a very serious question—then he should have clearly set out what part of the dropping apparatus he invented. It is, in fact, a duplication of the Finn device for dropping corn, two tubes, side by side, operating by a common valve.

It is contended that this claim was established by the result of the trial of *Case vs. Brown*, 1 Bissell R., 382, in this court, which judgment was sustained by that of the Supreme Court; but it will be recollected that the point put to the jury in that case, and upon which they found, was whether the defendant used all the various parts of the combination of Case in the dropping apparatus: and it may well be that they believed that he did not so use, and therefore found against Case and for Brown, on that issue. It has therefore become no less the duty of the court to look into this claim of the plaintiff, in consequence of its being presented in this case, notwithstanding the determination of the case of *Case vs. Brown*.

Nothing has thus far been said of the machine of Job Moffett, which, it is claimed, was made and used about the year 1834, at and near New Richmond, Ohio. The testimony bearing on this machine is certainly very remarkable. There are twelve witnesses who, with more or less confidence, verify its existence. On the other hand, a very large number of witnesses living at the same time at and near New Richmond, negative this, and among them is Moffett himself, now a resident of Oregon.

I am convinced there was a machine made by Moffett for corn planting, consisting in part of runners and rollers, and a flexible frame, but the testimony as to the peculiar structure of the different parts of the machine cannot be confidently relied upon. It was the only machine, and seems to have

been abandoned. No controlling stress has, therefore, been placed upon it.

As has already been stated, the defendants are all claiming under patents, many of which embrace essential parts of their machines. They are, therefore, *prima facie* protected in their rights. It is true, if the plaintiff is a prior inventor and patentee, their claims, so far as they trench upon his, must yield. But all of these parties claim to be improvers of the corn planter. There are numerous patents upon different parts of the machine, and it would seem to be the duty of the court to confine each inventor to the specific parts which he invented, and to which he is fairly entitled.

The plaintiff is undoubtedly to be classed among the improvers of the machine, and has a respectable rank among them; but starting out with somewhat limited claims in 1853 and 1855, they in 1860 swelled to such large proportions that one of the great difficulties in the case has been, in the midst of the wide field covered by his claims, to distinguish what were valid; in other words, to discriminate justly between improvements made by him, and those made by others.

It will be observed that the court has felt under the necessity, from the nature of the case, of limiting the claims of the plaintiff within somewhat narrow bounds. The reasons why this has been done have been given, and to the court seem conclusive. As an illustration of the character of many of these claims, it may be stated that several of them consist in putting the operator upon the planting machine Now, claims of that kind should be scrutinized with peculiar jealousy. It is only under very special circumstances that a claim for a seat on a machine, upon which an attendant or operator can ride, should be sustained. All of these machines, certainly many, and among the earliest of them, had a platform or place for an attendant to ride. It is one of the indispensable requisites of the machine, and they were all constructed in that way. It was the simplest device possible to suggest that a man should get upon the machine and there ride. Therefore, when a party claims, as the plaintiff does in many of these cases, the

method of putting a rider or attendant upon a machine as an invention, it should clearly appear that it was a patentable method. And then he can only claim his peculiar method. He cannot, under cover of his own mode, seek to include others. That is what the plaintiff has attempted to do in this case, just as he has in relation to the runner. Every man must be left to his own method of mounting the rider and using the runner, whether the result of mechanical or inventive skill.

The bill will therefore be dismissed.

This case is now pending before the Supreme Court, having been argued and submitted, but no decision rendered. [*Reporter*.

CHICAGO FRUIT HOUSE COMPANY vs. BUSCH.

CIRCUIT COURT. — NORTHERN DISTRICT OF ILLINOIS. — MARCH TERM, 1871.

IN CHANCERY

PATENT—RE-ISSUE—INFRINGEMENT.

1. VALIDITY OF RE-ISSUED PATENT.—In considering the validity of a re-issued patent the only question is as to whether the invention described in the re-issued letters is to be found in the original model, specifications or drawings of the invention.

2. In the re-issued patent the patentee need not claim all that was claimed in the original patent, but may retain what he deems proper.

3. ACTION OF COMMISSIONER.—The courts must accept the action of the Commissioner of Patents, as the lawful exercise of his authority, unless it is apparent upon the face of the patent that he has exceeded his authority, and there is a clear repugnancy between the old and the new patent.

4. PATENTEE MAY OMIT PART OF HIS CLAIM.—A patentee, the main and controlling element of whose invention was a metallic ice floor, may in a re-issued patent omit the specifications of the method and form of the supports which had formed a part of his original letters patent, without impairing his claim to the subject matter retained.

5. "AIR-TIGHT"—IMPERFECT CONSTRUCTION.—The term, "air-tight" as applied to the floor of an ice reservoir, means substantially "water tight," or such a construction of the floor that the water will not run down upon the articles stored below, nor the air escape to melt the ice above. A patent for such a floor cannot be evaded by constructing a leaky floor. A person cannot use a patented device by constructing it in an imperfect manner.

6. ADDING TO PATENTED ARTICLE.—The fact that in combination with the floor patented, the defendants use another floor, cannot be allowed as a defense. If the floor patented is any part of the defendants' combination, any additions or improvements made thereto do not entitle them to use the part patented

This was a bill in equity to recover damages for past and to restrain the future use by defendants, of a patent issued by the United States to Benjamin M. Nyce, bearing date the 5th day of January, 1869, for "An improvement in buildings for preserving fruit and other substances." The substantial allegations in the bill were, that on the 19th day of March, A. D., 1861, a patent was duly issued by the United States to said Benjamin M. Nyce for a new and useful invention before then duly made by said Nyce, for an "improvement in buildings for preserving fruit and other substances;" that afterwards said Nyce, in pursuance of the acts of Congress in that behalf made and provided, duly surrendered his said patent, and on the 5th day of January, A. D. 1869, he received new and re-issued letters patent for said invention with amended specifications for the residue of said term of seventeen years from the 19th of March 1861; that on the 17th day of February, 1869, by his assignment in writing of that date duly executed, delivered and recorded, said Nyce assigned, sold and transferred to said complainant, who, it is averred, is a body corporate duly created and existing under the laws of the State of Illinois, all his right and title to make, use and vend the improvements specified in and by said re-issued letters patent, in and throughout the County of Cook, in said State of Illinois, and that ever since said assignment said complainant has been and is the sole owner of said patent, and has the sole right to make, use and vend said invention in said County of Cook; that said invention is of great value to complainants, and yet defendants although knowing complainant's right to said invention, did and have unlawfully and without right, used said invention and improvement, and are still using the same, to the great damage of complainant.

The answer did not deny the issue of said letters patent nor the making of said invention by said Nyce, nor deny or put in issue the novelty of said alleged invention nor the validity of the patent. It also admitted that defendants were using buildings for the preservation of lager beer, but denied that said buildings were constructed substantially in the manner described in said patent.

King, Scott & Payson, for complainant.

Nissen & Barnum, for defendants.

BLODGETT, J.—The issue in this case under the pleadings is simply upon the question of the identity of the three devices used by the defendants with that invented and patented by Nyce. It appears from the evidence that the specifications in the original letters patent, described a building constructed with two or more outer walls with the space filled with chaff, tan-bark, charcoal or other non-conducting substances, after the manner usually adopted for the construction of ice-houses. This building was to be divided into upper and lower rooms or chambers by a floor to be made of metal, recommending galvanized iron as the best material for the purpose. The upper room or chamber was to be filled with ice, packed upon said metallic floor, and the articles to be preserved were to be placed in the lower room or chamber. The patentee then describes the method in which said floor is to be supported, providing for transverse joists, the upper edges of which should be beveled so as to cover as little as possible of the under surface of the floor, and the beveled edges should be tipped or covered with metal, thereby securing the contact of the atmosphere of the preserving chamber with the greatest possible amount of the surface of the ice floor. Provision was also made for the drainage of the water from the melting ice by means of pipes at the sides of the building, passing through the walls. To secure the necessary degree of dryness in the air of the preserving chamber, certain chemical absorbents were prescribed to be used. The specifications also described a vestibule or entry, to be so constructed as to enable persons to enter the preserving chamber without the admission of external air.

The claims of the patentee under this original patent were:

1st. The construciton of a preserving house, whose lower chamber, to contain provisions, is separated from its upper or ice chamber by an air-tight metallic ffoor, "M," supported on metallic joists, "L," whose uppor surfaces consist of a series of thin edges or points, substantially as set forth.

(2d claim, not important in this case.)

3d. The combination of the vestibule and the preserving chamber, constructed as set forth.

4th. The combination of the preserving chamber with the use of the chemicals used for desiccating the atmosphere, and the hygrometric apparatus.

In the re-issued letters the patentee only claims on:

1st. An insulated house * * * having an ice reservoir above, and separated from it by an air-tight metallic floor.

2d. The combination of such a house with a vestibule, as described

3d. The use in such a house of a hygrometer, constructed substantially as explained.

It will thus be seen that while in his original patent the inventor claims the various parts of his house and apparatus in combination, in his re-issued patent his first and chief claim is for an air-tight metallic floor, separating the preserving chamber from the ice reservoir. He does not as in the first patent, claim for a metallic floor, resting on metallic joists with thin edges, although he states that method of construction as the best, when the lowest degree of temperature is desirable. But he says:

"It is obvious that there are purposes to which these improvements are applicable, that do not require cold so excessive or an atmosphere so dry as to preserve fruit through successive seasons. For example, to preserve lager beer a temperature of forty-six degrees will answer, forty-three degrees being the best temperature to insure the slow and even chemical changes necessary during its two weeks of fomentation, a necessity which has heretofore closed almost all the breweries of the world from June to Semtember. For all such purposes the strict conditions may be modified, as greater or less cold or dryness is desired. If moisture is not detrimental, leave out the absorbents. If a uniform temperature of forty degrees will suffice, the walls may be less perfect, and the instructions for insulating the metal ice floor less rigidly adhered to."

The defendants are brewers, and the alleged infringements are in certain buildings constructed by them in this city, for storing lager beer during the hot weather. The proof shows that all said buildings contain an ice reservoir, separated from the store or beer room by a galvanized iron floor, resting on wooden joists with flat edges or bearings, or on wooden knobs; that said floors pitch or descend from the center towards the

outer wall, and next the wall have a trough or gutter to catch the drippings from the melting ice—the floor not fitting tightly to the wall. Defendants no not use the chemical absorbents described in the patent, but to protect the contents of the store room from the drippings from the ice floor, caused either by leakages or condensation, they construct another floor of zinc, or zinc and wood, under the metalic ice floor, which is made tight and sloping, or pitching from the center to the walls of the room. In fact, they construct a zinc roof beneath the ice floor and over the contents of the store room, to catch and carry off the water which would otherwise drip from the ice floor upon the beer casks. And defendants claim that the floor thus used by them does not infringe on complainant's patent, because,

First. Complainant's patent calls for an iron floor, resting on iron supports—*iron on iron.*

Second. The water runs off from their floor differently from what it does from floors described in the patent.

Third. Their floor is not air-tight. It has a space next the wall, and also leaks some.

Fourth. They use the metallic ice floor in combination with the zinc floor or roof beneath it, and without this zinc floor or roof the ice floor would be valueless to them.

By their first point the defendants insist that the patentee is bound by the specifications in his original patent, and can only hold under his patent an iron floor on iron supports or bearings. This involves the question as to the validity of the re-issued patent.

The 13th section of the act of July 4, 1836,[1] provides that:

"Whenever any patent * * shall be inoperative or invalid by reason of a defective or insufficient description or specification, or by reason of the patentee claiming in his specification, as his own invention more than he had or shall have a right to claim as new, if the error has or shall have arisen by inadvertency, accident or mistake, and without any fraud-

[1] 5 U. S. Statutes at Large, 122.

ulent or deceptive intention, it shall be lawful for the Commissioner * * * to cause a new patent to be issued to the said inventor * * * in accordance with the patentee's corrected description and specifications."

In considering the validity of a re-issued patent, then, the only question is as to whether the invention described in the re-issued letters is to be found in the original model, specifications or drawings of the inventor. In other words, is it his invention? If it can so be found, although defectively described, or if claimed with other matters not new or not the invention of the patentee, the re-issue is granted; and the action of the Commissioner in granting the re-issue cannot be impeached or inquired into, except for alleged fraud or collusion.[1]

In the re-issued patent the patentee need not claim all that was claimed in the original patent. He may retain what he deems proper.[2] In this case the original specifications described a metallic ice floor, but claimed it in combination with the beveled and metal-tipped joists or supports. And the courts must accept the action of the Commissioner as the lawful exercise of his authority, unless it is apparent upon the face of the patent that he has exceeded his authority, and there is a clear repugnancy between the old and the new patent.[3]

"An inventor is always at liberty in a renewed patent to omit a part of his original invention, if he deems it expedient, and to retain that part only of his original invention which he deems it fit to retain. No harm is done to the public by giving up a part of what he has actually invented; for the public may then use it, and there is nothing in the terms or policy of the Patent Act which prohibits such a restriction."[4]

"When the commissioner accepts a surrender of an original

[1] *Blake vs. Stafford*, 3 Fisher, 294.

[2] *Crompton vs. Belknap Mills*, 3 Fisher, 536.

[3] *Woodworth vs Stone*, 3 Story, 749.

[4] *Carver vs. Braintree M'f'g Co.*, 2 Story, 432.

patent and grants a new patent, his decision in the premises in a suit for infringement is final and conclusive, and is not re-examinable in a suit in the circuit court, unless it is apparent upon the face of the patent that he has exceeded his authority, that there is such a repugnancy between the old and the new patent that it must be held as a matter of legal construction, that the new patent is not for the same invention as that embraced and secured in the original patent."

Per Clifford, J., in *Seymour vs. Osborne*, 11 Wallace, 516, citing *Battin vs. Taggert*, 17 Howard, 83; *O'Reilly vs. Morse*, 15 Howard, 111; *Sickles vs. Evans*, 2 Fisher, 417; *Allen vs. Blunt*, 3 Story, 744.

"Corrections may be made in the description, specification or claim when the patentee has claimed as new more than he had a right to claim, or when the description, specification or claim is defective or insufficient, but he cannot under such an application make material additions to the invention which were not described, suggested, nor substantially indicated, in the original specifications, drawings or patent office model."[1]

In the re-issue he claims simply the metallic ice floor. This is certainly within the rule. This floor was described in the original specifications, although combined with something else the inventor does not now desire to insist upon. There is no dispute but the patentee was the first inventor of the metallic ice floor, and he had a right to claim it as the sole subject matter of his invention, if he chose to do so. There is no departure from the original subject of his invention. He has merely simplified his claim, and confines it now to a single element, instead of a combination of elements, as at first. He is not confined to iron resting on iron; but may rest his floor on any support which enables it to subserve the object for which it is used.

The metallic ice floor was the main and controlling element of the invention. The method of supporting it, of drying the air, of securing ingress and egress, were mere incidents, whose use secured the more perfect working of the invention.

[1] *Seymour vs. Osborne*, 11 Wallace, 516.

This also disposes of the second objection, that the water runs off differently from defendants' floor than it does from complainant's.

It is obvious that some provision must be made for taking off from the floor the water formed by the melting of the ice, but the patentee is not confined to any special method of taking it off. He can carry it off by a gutter or through holes in the walls, or otherwise, as is most convenient.

But it is urged, thirdly, that the patentee's floor must be "air-tight," and it is said defendants' is not air-tight, because it does not close up and make a tight joint with the wall, but admits a gutter along its edge between the floor and walls. I think it evident the term "air-tight" used in the claim of the re-issued patent, is to be understood the same as "water-tight;" or, substantially, a tight floor through which the water would not run into the lower room to injure the articles stored there, nor the air escape into the upper room to melt the ice. This, of course, is a desirable condition, and the nearer air and water tight the floor is, the nearer the floor will be perfect. But I do not think the patent can be evaded by constructing and using a leaky floor.

Suppose a machine is patented in which a wheel is described as a material part—a wheel should be a perfect circle—could an infringer defend by showing that he used a wheel which was not a perfect circle? In other words, can any person use a patented device by constructing it in a slovenly or imperfect manner, so that it will accomplish the same kind of result as that intended by the inventor, but not so perfectly? But, as a matter of fact, the proof shows that all defendants' floors were made tight, and some have since become leaky by defective construction. Thus showing that in this regard the defendants attempted to make a tight floor, or an *air tight* one.

But the defendants say they use the metallic ice floor in combination with the zinc floor underneath, and hence they do not infringe. This fact cannot be allowed as a defense, if in point of fact the complainant's floor is part of the defend-

ants' combination, because the Nyce patent is for the metallic ice floor, and any additions or improvements added thereto do not entitle defendants to use what belongs to the owners of this patent. For the purposes to which this device is applied by defendants, I presume the zinc floor, to take the place of chemical absorbents, and to prevent drip, is a useful improvement, but that does not entitle defendants to use it without the consent of the patentee.

So, too, with regard to the vestibule. Defendants claim they do not use the vestibule described by the patentee, but they do use a room which performs the substantial functions of the vestibule in the patent. That is to say, the store room is entered through an adjoining room or entry, thereby preventing the external air from rushing into the preserving chamber or store room; so that this entry, as used by defendants in combination with the store room, is in all essential respects the equivalent of the patentee's vestibule. As this case stands, then, upon the pleadings and proofs, Nyce must be deemed the original and first inventor of a metallic ice floor for preserving houses, and of the vestibule in combination therewith. This fact, not being denied by the pleadings, must be held to be admitted, or, if not admitted, defendants only ask for proof, and that is furnished by the production of the letters patent. The right to use and vend this patent has been duly assigned to and is held by complainant. The floors used by defendants are, in their construction and functions, substantially like that described in the patent, and complainant, as assignee of the patent for the county of Cook, is entitled to recover its damages for the infringement.

The matter will, therefore, be referred to H. W. Bishop, Esq., one of the masters of this court, to take testimony, and report as to the amount of said damages, and the injunction will be granted according to the prayer of the bill.

In re THOMPSON.

DISTRICT COURT.—NORTHERN DISTRICT OF ILLINOIS.—MARCH TERM, 1871.

IN BANKRUPTCY.

FIFTY PER CENT. CLAUSE.

1. REFERS TO FAIR CASH VALUE OF ASSETS.—Is not operative against a bankrupt, if the fair cash value of the assets turned over to the assignee is equal to 50 per cent. of the claims proved, on which he was liable as principal debtor.

2. NOT CONTINGENT UPON AMOUNT OF DIVIDEND.—The change made by the amendment of July 27th, 1868, clearly indicates that the discharge is not cont ngent upon the amount of dividend actually received by creditors.

3. *It seems*—that if the bankrupt schedules the goods at an exaggerated value a creditor may resist the application, and introduce proof of the actual value of the goods turned over.

Application by bankrupts for their discharge.

On the 20th day of July, 1869, Wm. P. Thompson and Geo. H. McClallen were, as co-partners and individually, duly adjudged bankrupts by this Court on creditors' petition. The opinion of the Court on the adjudication is published in this Volume, *ante*, p. 166. An assignee of their estate was duly elected, and the estate transferred to him.

The total amount of debts proved against the firm was $20,890.98, contracted after January 1, 1869, most of which were not due at the time proceedings were commenced.

The indebtedness proved against the estate of Wm. P. Thompson amounted to $116.75, all of which was contracted prior to January 1, 1869.

The debts proved against said McClallen individually amounted to $10,683.03, all of which were contracted prior to January 1, 1869, and had been paid by the proceeds of his separate estate.

The firm assets, including the choses in action, were scheduled by the firm at nearly seventeen thousand dollars. The goods and fixtures were sold by the marshal, as messenger of the court, before the election of the assignee, and at the instance and request of the majority in number and value of the creditors; and the total amount realized by such sale, and also from collections, was about seven thousand five hundred dollars.

The bankrupts took and filed in the case the evidence of several persons who were acquainted with their stock of goods and knew their value, showing that the value of said goods was fully equal to the amount stated in the schedule, and that the sale of said goods was made for much less than half their fair cash value in the market.

The actual value of the assets of the bankrupts was, therefore, more than equal to 50 per cent. of the debts proved against them; while the amount realized in money by the assignee for the payment of dividends to the creditors, fell far short of 50 per centum.

Bentley & Hart, for creditors.

Rich & Noble, for Thompson.

Bonney & Griggs, for McClallen.

BLODGETT, J.—The bankrupts now apply for a discharge, and the question is, are they entitled to a discharge on the facts as they appear on the record. No written consent of the creditors or any part of them to such discharge is filed.

By the provisions of the bankrupt act as originally passed, no person who was adjudged bankrupt after one year from the time the act took effect, was entitled to his discharge, unless his assets were sufficient to pay fifty cents on the dollar of his proved debts. But by the amendment of the 27th of July, 1868, the change between the original act and the law as it now stands amended, is noteworthy, and seems clearly to indicate that the discharge is not contingent upon the amount of divi-

dend actually realized by the creditors if the fair value of the assets turned over to the assignee was equal to fifty cents on the dollar of the claims proved against him.

The assets must be equal to fifty cents on the dollar of the debts proved. This will not admit of a fictitious or exaggerated valuation of his assets by the bankrupt in his schedule or inventory; while on the contrary, if the assets are, at a fair and just estimate and valuation, equal to fifty per cent. of the debts proved, the bankrupt is not to be denied his discharge by reason of any sacrifice made by the assignee or creditors to convert the assets into cash, or because of the absorption of so large a proportion of the proceeds by expenses as to prevent the payment of fifty cents on the dollar.

In this case the assets taken by the marshal, at their fair cash valuation, amount to more than fifty cents on the dollar of the proved debts. And there is no objection interposed to the discharge on the ground that the assets were overvalued; but, on the contrary, the proof taken shows that the goods were worth all they were scheduled at, and that they were sold within a very few days after the proceedings were commenced, at the instance of a majority of the creditors, and against the protest of the bankrupts; so that if there was any loss on the goods, it was fairly chargeable to the creditors. Undoubtedly any creditor might resist the application for discharge on the ground that the assets surrendered did not bear the required proportion to the debts, and upon the issue thus made, proof of the actual value of the assets could be heard by the court.

But where no such objections are made, and the record shows assets equal in value to fifty per cent. of the debts proved, I think the discharge should issue, if no cause is shown to the contrary; and as no such cause is shown in this case, the discharges will be issued to the bankrupts respectively, on their taking the required oaths and otherwise complying with the rules provided for granting discharges.

This rule applies to an involuntary as well as to a voluntary bankrupt. *In re Bunster*, 5 Bankrupt Register, 82.

The word "assets" in this connection construed. *In re Freiderick*, 3 Bankrupt Register, 117; *In re Kahley*, 6 do., 189.

The assets consist of the sum which remains after discharging all liens. *In re W. H. Graham*, 5 Bankrupt Register, 155.

It is held in *In re Borden & Geary*, 5 Bankrupt Register, 128, that in the absence of proof to the contrary the proceeds in the hands of the assignee will be taken to be the true value of the assets.

By the amendment to this 33d section, approved July 14th, 1870, the fifty per cent. clause does not apply to debts contracted prior to January 1st, 1869.

For such debts he may obtain a discharge without reference to this clause. *In re Slay*, 4 Bankrupt Register, 82.

Consult *In re Kahley*, *ante*, *p.* 383; *In re Lincoln & Cherry*, 7 Bankruptcy Register, 384. [*Reporter.*

Ex parte GEARY.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—MARCH TERM, 1871.

WHEN COURT MAY PRESCRIBE PLACE OF PUNISHMENT.—Unless the law of Congress prescribes in what particular place the punishment of an offense shall be executed, the District Court has the power to designate any place within its jurisdiction, and, subject to this qualification; the acts of Congress of March 3, 1825, June 30, 1834, and March 3, 1865, so far as they refer to the place of imprisonment, are merely declaratory.

2. HARD LABOR IN PENITENTIARY.—As by the laws of Illinois the prisoners in the State Penitentiary are subject to hard labor, unless it is otherwise directed in their sentence, and the act of June 30, 1834, provides that criminals sentenced by the United States Courts shall be subject to the same discipline and treatment as convicts sentenced by the State Courts, it follows as a conclusion of law that the former are subject to hard labor as a part of the imprisonment. It is not necessary, in order to clothe the court with authority to imprison in the Penitentiary, that a part of the punishment, by the terms of the sentence, should be hard labor.

3. OFFENDER CANNOT OBJECT THAT STATE IS NOT AUTHORIZED TO RECEIVE HIM.—The State would have the right to refuse the use of its Penitentiary to the prisoners of the United States, but where for more than thirty years prisoners convicted in the courts of the United States have been sentenced to the Penitentiary, and have been there received and kept, with the knowledge and acquiescence of the State authorities, and their expenses paid by the United States, it is not competent for an offender sentenced to the penitentiary by the federal court, to object that there is no express legislation by the State authorizing such prisoners to be there confined; such objection could only be made by the State.

4. TERM MAY BE DIVIDED.—The District Court does not exceed its power in fixing a part of the term of imprisonment in the county jail, and the remainder in the Penitentiary.

5. The usual practice on conviction is for the court to direct the marshal to take the prisoner to the Penitentiary within a certain number of days, a sentence which, when the prisoner is already in jail, is essentially the same.

6. The fact that the prisoner is retained for a time either before or after sentence, in the county jail, does not, in either case, authorize a writ of *habeas corpus*.

Ex parte Geary.

James Geary was convicted in the District Court of the United States for this District on the 28th of February 1871, of the crime of "conspiracy to defraud the United States," under the thirtieth section of the act of March 2, 1867.[1] The sentence of the court was that he be imprisoned in the jail of Cook county for twenty days, and that after the expiration of that time he be imprisoned in the State Penitentiary at Joliet, in this district, for one year, and that he be fined $1,000 and pay costs, and that he stand committed until the fine and costs be paid; and the marshal was ordered to execute the sentence of the court upon the prisoner by placing him in the jail, and afterwards in the penitentiary. At the expiration of the twenty days he was taken by the marshal from the jail in Cook county to the penitentiary at Joliet, where he was held by the Warden.

This was an application by the prisoner for a writ of *habeas corpus*, the petition alleging that his imprisonment was illegal on three grounds:

1. Under the third section of the act of Congress of March 3, 1825, the court had no authority to direct his imprisonment to be in the penitentiary, because the term for which he was imprisoned did not exceed one year.

2. The penitentiary is not allowed by the Legislature of the State as a place of imprisonment for persons convicted and sentenced in the courts of the United States, and, therefore, it is not within the terms of the act of Congress.

3. The court could not divide the punishment, making it part in the county jail and part in the penitentiary.

Robert Hervey, *Jas. R. Doolittle* and *R. H. Forrester*, for petitioner.

J. O. Glover, U. S. District Attorney, and *L. H. Boutell*, Assistant District Attorney, for the United States.

Drummond, J.—The only question proper to be considered on this application is, whether the court can see that the issuing

[1] 14 U. S. Statutes at Large, 484.

of the writ would be of no avail, the rule being that it should issue unless it would be useless.

The fifteenth section of the act of March 3, 1825,[1] declares "where any criminal, convicted of any offense against the United States, shall be sentenced to imprisonment and confinement to hard labor, it shall be lawful for the court by which the sentence is passed, to order the same to be executed in any state prison or penitentiary within the district where such court is holden, the use of which prison or penitentiary may be allowed or granted by the legislature of such state for such purpose." The third section of the act of March 3, 1865,[2] provides "In every case where any person convicted of any offense against the United States, shall be sentenced to imprisonment for a period longer than one year, it shall be lawful for the court by which the sentence is passed, to order the same to be executed in any state prison or penitentiary within the district or state where such court is held, the use of which prison or penitentiary is allowed by the legislature of such State for such purpose." The act of June 30, 1834[3] declared that any criminal imprisoned in a penitentiary, should be subject to the same discipline and treatment as the state convicts. The only material difference between the act of 1825 and that of 1865 is, that the former speaks of confinement to hard labor, and is without limitation as to the time of imprisonment, and declares that the imprisonment is to be in the penitentiary or state prison in the district where the court is held. The act of 1865 does not mention hard labor, but only imprisonment, and for a period longer than one year, and it may be executed in any penitentiary or state prison in the district or state where the court is held.

The legislation of Congress has been by no means uniform as to making hard labor a part of the penalty of imprisonment. The crimes act of 1790, parts of which are still in force,

[1] 4 U. S. Statutes at Large, 118.

[2] 13 U. S. Statutes at Large, 500.

[3] 4 U. S. Statutes at Large, 789.

seems not to have mentioned it at all as connected with imprisonment. In some of the acts passed between that time and the act 1825, it is referred to, and not in others. The general act of 1825, in specifying imprisonment, in most cases adds "confinement to hard labor." In the various criminal laws which have been passed since, it is sometimes mentioned and sometimes omitted. In some cases the law, after imposing the penalty of imprisonment, to be adjudged by the court, declares separately that the prisoner shall be kept at hard labor, thus, apparently, making it an injunction upon the person who has the custody of the prisoner. The two sections which have been already cited from the act of 1825 and from that of 1865, are striking illustrations of this peculiarity. In the one, hard labor is mentioned; in the other, omitted. There would seem to be no good reason for this, unless it be that the act of 1825 apparently discriminates, and subsequent legislation does not.

In our state the law provides that the court, in the case of the confinement of a criminal in the penitentiary, shall designate what part of the punishment shall be solitary confinement, and what part shall be hard labor, and there are various statutes which provide for and regulate the hard labor by convicts in the penitentiary, and it is clear that all who are not by the order of the court in solitary confinement are subject to hard labor, and therefore it follows, as a conclusion of law, that when a person is sentenced by a court of the United States to the penitentiary of this state, he is subject to hard labor as a part of the imprisonment, because the act of 1834, as already stated, provides that the prisoners of the United States shall be subject to the same discipline and treatment as the prisoners of a state.

The only question that can arise upon this part of the case is, whether, under the language of the act of 1825, it is necessary, in order to clothe the court with the authority to imprison a convict in a penitentiary, that a part of the punishment, by the terms of the law, should be hard labor. The language of the statute, it will be recollected, is, "shall be

sentenced to imprisonment and confinement to hard labor." The statute is without limit as to the time of the imprisonment. The act of 1865 omits the words "confinement to hard labor," and declares that there shall be authority in the court to impose this punishment, provided it is for a term exceeding one year. It may be that the true meaning of this law is that the imprisonment in the penitentiary should be for a period longer than one year, and that the punishment cannot be divided so that a part of it shall be in one place and a part of it in another, and thus bring it within the law, provided the term of imprisonment in both places together is more than one year. There would be no doubt upon the subject, provided it were a part of the penalty attached to this offense that the offender should be confined to hard labor, because whenever he is confined in the penitentiary, by the very terms of the law he becomes subject to hard labor, and both the statutes can stand, that of 1865 not necessarily repealing that of 1825.

In 1789 the first Congress recommended to the legislatures of the several states that they should make laws requiring the keepers of jails to receive and keep prisoners committed under the authority of the United States. The implication arising from this resolution is, that the jails in the states respectively were proper places in which to imprison persons convicted under the laws of the United States, and that those who kept such jails might take charge of the prisoners thus convicted and sentenced; but, inasmuch as there might be cases where they would not, this resolution was passed, recommending to the legislatures to make it imperative on the keepers of jails to receive and keep them.

In 1791 another resolution was passed, which declared that, where a state had not complied with the recommendation, the marshal, under the direction of the judge, might be authorized to hire a convenient place to serve as a jail. Then, by a resolution of 1821, this provision was extended to all cases where the states had complied with the recommendation originally, and had afterward refused the use of their jails.

It will be seen that during all this time there is nothing in the legislation of Congress, except what is contained in these various resolutions, as to the place where persons convicted under the laws of the United States, should be imprisoned. The inference seems to be, throughout, that the jails of the respective states were proper places, and that the states ought to provide by law that the keepers of those jails should be obliged to receive and detain prisoners of the United States. And, in some instances, we know that there was, and still is, this legislation of the states. This being so, the question arises as to the authority of a court of the United States to imprison a person convicted of an offense, in any jail or prison in the district, authorized by the state to receive prisoners, even though the case might not be literally within the act of 1825 or 1865. And my opinion is, that the power is incidental to the court; that it follows necessarily from the legislation of Congress, and from the authority given to the court to imprison. The effect of that legislation is, that when the court sentences a party to imprisonment, it can be executed in any place where, by the authority or permission of the state, the prisoner can be received and detained.

What is a penitentiary of a state, but a prison in which a person convicted of an offense may be confined? In what respect is the penitentiary at Joliet different, so far as the power of this court is concerned, from the jail of this county? The court has the same power over the prisoner in the one case as in the other; can direct its officer as well to go to Joliet as to the jail of this county. The prisoner is just as much within the control and jurisdiction of the court in the one case as in the other, and I think, unless the law of Congress prescribes in what particular place the punishment of an offense shall be executed, that the court has the power to declare that the imprisonment may be either in the jail of Cook county, or in the penitentiary at Joliet. When the question is as to the power of the court to direct imprisonment outside of its jurisdiction, then an act of Congress is necessary, as in the law of 1865. The court, without some such pro-

vision, could not sentence a man beyond its jurisdiction, because the court would have no control over the prisoner. It was conceded in the argument that there is no law of Congress which expressly directs that the imprisonment of any party shall be in a county jail, all of which it was admitted that the state had given, by legislation, for that purpose.

It is to be observed, and I think it throws great light upon this subject, that there are various acts of Congress which declare that where a party has committed a particular offense, the penalty shall consist of fine or imprisonment, or fine and imprisonment in a penitentiary, thus limiting it to the penitentiary; as under the fourth section of the act of February 26, 1853.[1] The penalty for the offense is, "on conviction in any court of the United States having jurisdiction thereof, shall pay a fine not exceeding $2,000 or suffer imprisonment in a penitentiary." The fifth section of the same act is, "shall pay a fine not exceeding $2,000, or suffer imprisonment in a penitentiary not exceeding three years." The sixth section of the same act is, "and shall upon conviction thereof be fined not exceeding three times the amount so offered, promised or given, and imprisoned in a penitentiary not exceeding three years." Of course there can be no doubt, that, when the law prescribes where the place of imprisonment shall be, it is the duty of the court to follow it, and the inference is that where the place is not prescribed, as is true of most offenses under acts of Congress, the court has power to designate any prison within the jurisdiction of the court. There might be some argument in favor of the position taken by the counsel for the prisoner in this case, arising from the fact that the law under which this party was convicted declares it to be a misdemeanor; but the various laws of Congress have, in a great measure, done away with the distinction that existed at common law between a felony and a misdemeanor; and, it is is certain, for a mere misdemeanor a party may be imprisoned in the penitentiary. Suppose the only place of imprisonment in a state is a penitentiary—there are, or may be, such cases—what is the

[1] 10 U. S. Statutes at Large, 170.

Court of the United States to do? If all the prisoners within the limits of a state were confined to the state penitentiary, or prison, and there were no regular county jails, what would be done in such case with the prisoners of the United States? The view that I take, then, of these statutes is that they are declaratory acts, and nothing more; that they were passed for the purpose of removing doubts which might have existed in relation to the authority of the court, but that the court had authority, independent of those statutes. At common law the Court of King's Bench had power to sentence a convict to any prison in England.[1]

The next question is, whether the court had authority to imprison the defendant in the penitentiary, without some express legislation on the part of the State of Illinois, giving the right to the court there to imprison him.

The language of these statutes, it will be seen, and such, it is claimed, is the implication from the resolutions which have been referred to, is that the court has authority to imprison a convict in a state prison or jail, only where there is an express legislative permission given, and the instance is cited of such authority by an act of the Legislature of this state in relation to county jails, passed shortly after the state was admitted into the Union, and which has existed ever since. There is no doubt that a state has the right to refuse the use of its jails or penitentiary to prisoners of the United States. They are all mere state buildings and institutions erected at the expense of the states, and under the authority of their laws. The Government of the United States has no control over them, except with the consent of the states. Undoubtedly the United States could erect jails or penitentiaries within the limits of the several states, for the confinement of prisoners of the United States. That has not been done in this state. There is here, therefore, no jail or penitentiary, or building, erected by the United States, except, perhaps, it may be rooms intended for the temporary accommodation of prisoners of the United States.

[1] 1 Bishop on Criminal Procedure, 985, 886, and notes and authorities cited.

The question is, whether, in the first place, there has been any legislation on this subject, and, secondly, whether it is absolutely necessary that there should be.

The counsel for the petitioner have stated, and so also have the counsel for the Government, that they have been unable to find any act of the Legislature, or any resolution, which expressly authorizes the Federal Court to direct a person convicted of crime to be imprisoned within the penitentiary of the state. I have not been able to find any in the limited time I have had to examine this subject. Whether there is any or not I am unable to say; but what are the facts in relation to the confinement of prisoners in the penitentiaries of this state? The penitentiary at Alton has been finished for the reception of prisoners nearly forty years. It is over thirty years since parties convicted in the federal courts of this state have been sentenced to imprisonment in the penitentiary, sometimes with hard labor expressed in the sentence of the court, and sometimes without. The first case that has been found by the District Attorney is one in 1838 — thirty-three years ago—and from that time to the present, numerous persons have been sentenced to imprisonment in the penitentiary of this state. The act in relation to the penitentiary at Joliet provides that the same laws, rules and regulations shall exist as to it as to the penitentiary at Alton. The question presented in this petition has never been made before in this state. For more than thirty years prisoners have been constantly sent to the penitentiary, and received without question by the authorities of the state, and bills for the use of the penitentiary, and for the keeping of prisoners, presented by the State and paid by the Government.

One of two things, I think, is true from this state of facts: either that there was authority given by the Legislature, and omitted in the various compilations of the laws and resolutions, or that there was some general law — like that of 1831, for example—which was construed as giving this authority to the court, which might be doubtful in its construction, and which might seem to apply simply to

prisoners of the state. Whichever view be taken, it seems to me that the conclusion necessarily follows that it is not competent for the petitioner, under this state of facts, to make this objection. It is one that can only come from the state. If it be true that there was legislative authority given, of course that is an end of the question. If the authority was understood to exist from a general law so decided at the time, and that has been acquiesced in for more than thirty years by the authorities of the state, how much stronger would it be if there was an express declaration of the legislature of the state?

What is the object of a grant by the legislature of a state to authorize the courts of the United States to imprison convicts in the penitentiaries? It is nothing more than an indication of the will of the state, and I am not prepared to say that will may not be shown in some other way than by an act of the legislature, or a resolution.

Perhaps there might have been further inquiry whether or not an express grant by the legislature of the state had been made, but as I have no serious doubt upon the general question, I hardly thought it worth while to postpone the decision in order to obtain that information. It would be too serious a matter, after a practice so long continued as this, to allow a defendant to raise a question of this kind, the principle being, as I contend, that he can be confined, unless the act of Congress expressly designates a particular place, in any prison within the jurisdiction of the court, the use of which is permitted by the state.

There is another question remaining. It is insisted that the court erred in fixing the imprisonment in two places, one in the county jail, the other in the penitentiary. Perhaps there is something objectionable in form, but it is a question of power on the part of the court. The point is, whether there is anything in the laws of Congress which restricts the authority of the court as to the place of imprisonment in this case. I think there is not.

Practically, the same result follows in all cases of a party convicted in this court. When he is in the county jail, for

example, the universal practice of the court is, if he is sent to the penitentiary, that the marshal be directed within a certain time to remove him there. Where the defendant is already imprisoned in the jail of the county, because the marshal has a given time in which to remove the prisoner to the penitentiary of the state, does that authorize the defendant to apply for a writ of *habeas corpus*, and be released? When the verdict is rendered against a defendant he is in custody of the marshal, who in practice places him in the county jail, where he remains till removed to the penitentiary. It is a reasonable exercise of power on the part of the court, and indispensable to the due execution of its mandate, and this sentence I take to be nothing more than this, except in form. If the marshal had been ordered, in this case, within twenty days to take the prisoner to the penitentiary, he being already in the jail, he would have to stay there until the marshal could remove him. The judge of the circuit court has no knowledge of the particular circumstances which induced the judge of the district court to divide the punishment in this case. It may have been some such object as that. While exception may be taken to this form of punishment, there can be none as a question of power or authority. On the contrary, the construction that has been given to this subject by this court for over twenty years, has been that all this legislation in relation to the place of imprisonment, except where the law particularly describes the place, is discretionary with the court, and that the acts of Congress are only permissive. For example, can there be any question that, notwithstanding the acts of 1825 and 1865, the court would have the power to imprison a party subject to confinement in the penitentiary, in any jail within the district where the court is sitting? Certainly not. The power of the court is undoubted, and these acts are simply permissive; "it shall be lawful," not that it is compulsory; it is lawful if it is done, not that the court is obliged to do it.

Writ refused.

HARVEY, Assignee, &c. vs. CRANE.

Circuit Court.—Northern District of Illinois.—March, 1871.

1. Chattel Mortgage—When Invalid.—A chattel mortgage, not valid as against creditors, under the State law, and under which the mortgagee had taken possession, having at the time reasonable cause to believe his debtor insolvent, is invalid as against the assignee in bankruptcy.

2. If Informal, not Cured by Subsequent Possession.—Though the mortgage be good as between the parties, and given to secure a *bona fide* debt, yet not having been acknowledged and recorded as required by statute, the mortgagee, having retained it until the insolvency of the debtor, cannot, by then taking possession, be remitted to his rights as of the date of the mortgage.

3. When Void as a Preference.—Though possession was taken before commmencement of proceedings in bankruptcy, and was in accordance with the provisions of the mortgage, yet, being within the time limited by the Bankrupt Act, it operated as a preference, void as against creditors, and equally void as against the assignee.

4. If Irregular, not Cured by Record.—In Illinois, recording a chattel mortgage in which material changes had been made since its acknowledgement gives it no additional validity.

The bankrupt, W. G. Parr, a merchant at Normal, McLean county, Illinois, borrowed of the defendant, a resident of Chicago, four thousand dollars, in March, 1869, for which he gave a note payable April 1st, 1870, and a chattel mortgage on the goods in his store, purporting in terms to include such goods, wares and merchandise as the mortgagor should add to the stock during the time the debt was maturing. The mortgagor was to keep possession, but the mortgagee was authorized to take possession and sell the property before the maturity of the note in several contingencies, and, among others, provided the mortgagor should attempt to sell any part of the goods, except in the usual course of business, without giving notice to the mortgagee.

Under the Illinois Statute (Gross' Statutes, 1871, p. 67, §1,) it is provided:

"No mortgage on personal property shall be valid as against the rights and interests of any third person or persons, unless possession of such personal property shall be delivered to, and remain with the mortgagee, or the said mortgage be acknowledged and recorded, as hereinafter directed." By § 2. A mortgage of personal property must be acknowledged before a justice of the peace in the district where the mortgagor resides, and the justice shall certify the same. By § 3. A mortgage so certified, shall be admitted to record in the county where the mortgagor resides at the time the same was made, acknowledged and recorded; "and shall thereupon, if *bona fide*, be good and valid from the time it is so recorded for a space of time not exceeding two years, notwithstanding the property mortgaged, or conveyed by deed of trust, may be left in possession of the mortgagor: *Provided*, That such conveyance shall provide for the possession of the property so to remain with the mortgagor."

The mortgage was executed and duly acknowledged March 20, 1869, and afterwards some material changes were made by consent of parties, but it was never re-acknowledged. It was forwarded to and received by the mortgagee, and retained by him until the 4th of March, 1870, when he went to Normal, and on the 5th of March filed the mortgage for record in the proper office. In the meantime the mortgagor had been in possession, had made additional purchases, and had been selling the goods as usual. On the 7th of March the defendant, by his agent, took possession of all the goods in the store. At this time, to the knowledge of the defendant, Parr was insolvent. On the 30th of March a petition in bankruptcy was filed against him, upon which he was adjudicated a bankrupt, and the plaintiff, his assignee, afterwards brought this action to recover the value of the goods taken by the mortgagee under his mortgage. The jury gave a verdict for the plaintiff.

Motion for new trial.

Tenney, McClellan & Tenney, for plaintiff.

John Borden and *G. F. Baily*, for defendant.

DRUMMOND, J.—It has not been claimed that the mortgage was valid under the statute as against creditors. In fact, it

not only was never acknowledged as it now stands, but it included after-purchased goods, and seemed to permit the mortgagor to go on and sell in the usual course of business.[1]

It is not disputed but that the mortgagee had a right, under a clause of the mortgage, to take possession. The record of the mortgage may be left out of the case, as it must be conceded that it gave no additional validity. There is no doubt that the mortgage was given for a *bona fide* loan.

The case then presents this question: Whether, conceding its validity between the parties, the defendant could retain the mortgage until the mortgagor became insolvent, and his creditors were pressing their claims, by suit and otherwise, and then could take possession, and, unaffected by the altered condition of the parties, be remitted to his rights as they stood at the date of the mortgage, and thus obtain a preference over other creditors.

As between the mortgagor and mortgagee, it was immaterial whether or not the mortgage was recorded, or whether the mortgage provided for the possession by the mortgagor, or for after-acquired property. Neither was it material whether the mortgagor sold the whole or any part of the property. All these things might be done, or omitted, as they agreed. It is only where the interests of other parties are affected by these stipulations that their validity can be questioned. If a mortgage had been duly acknowledged and recorded at the time the loan was made, then it would, under the 14th section of the bankrupt law, have become a lien, provided it was valid under the laws of this state.

But in this case it is claimed that a mortgage not valid as against creditors under the laws of this state, has ripened into an effectual lien or transfer by virtue of the possession taken on the 7th of March, because, though the mortgagor was then insolvent and the mortgagee knew it, proceedings in bankruptcy were not commenced till the 30th of March, and the assignee took as a purchaser, with notice of all equities. But there

[1] *Davis vs. Ransom*, 18 Illinois, 396.

was nothing operative as against creditors until the defendant took possession. As against them, until then, the defendant had no security for his loan. Can creditors keep their papers and supposed securities in their pockets, and permit their debtors to go on and do business as owners of the property, and as soon as trouble threatens, watch their opportunity and sweep away all, simply by taking possession?

There are authorities which appear to hold that if the mortgage is *bona fide* when made, and good between the parties, it is good against the assignee.[1]

If it be true that the assignee takes as a purchaser and subject to all equities, and that a secret transfer is an equity, then it can make no difference whether the creditor take possession before or after the commencement of the proceedings in bankruptcy, because if the possession relates back to the date of the secret transfer and overrides all intermediate acts, then it would seem to follow that the assignee could not touch the property, unless at the time of the supposed transfer there was some other objection than its secrecy. But we think it will hardly be contended that an unrecorded chattel mortgage in the pocket of the mortgagee at the commencement of bankruptcy proceedings, would be valid against the assignee, though it might be against the mortgagor.[2]

The possession, after proceedings in bankruptcy were commenced, under an unacknowledged, unrecorded chattel mortgage, should have no different effect. And if this be so, the reason is because, after the pretended security was given, a fact has occurred (*e. g.* the filing of a petition in bankruptcy) which gives a different aspect to the case, and it must be judged under the light of that fact.

The principle would seem to be the same in the case of a chattel mortgage, even though recorded, if void as against creditors under the law of the state. In each instance there would have to be something in addition to render it valid, as

[1] *In re Griffiths*, 3 Bankrupt Register, 179

[2] *In re Wynne*, 4 Bankrupt Register, 5.

by recording or taking possession before proceedings in bankruptcy were commenced.

A creditor may obtain a preference from an insolvent debtor with knowledge of the insolvency, if within the limitation prescribed by the law.[1] But the possession must be obtained by a complete act within the limitation. Here the mortgage did not create the preference as against creditors—that was invalid; neither did the record. It was still, when recorded, an invalid mortgage as against creditors, under the law of the state—among other reasons, because as it stood it was an unacknowledged mortgage. That which operated against creditors, if anything, was the taking possession on the seventh of March. It is true it was authorized by the mortgage, and it was in that sense the joint act of the mortgagor and the mortgagee, possession being the consummation of the act. The assignee represents the creditors, and any claimed lien which would be void as against creditors generally, would also be void as against the assignee.

In this case the defendant cannot rely upon the mortgage, because it is invalid as to creditors under the law of the state. He cannot rely on the possession, because it was taken under authority from an invalid mortgage, and because, further, the mortgage was wrongfully used by the defendant to obtain possession, he at the time knowing the insolvency of the mortgagor.

The motion for a new trial must be overruled, and judgment be entered upon the verdict.

The Illinois Supreme Court also holds that a proper acknowledgement and record of a chattel mortgage are indispensable to its valididy. *Gregg vs. Sanford*, 24 Illinois, 17; *Forest vs. Tinkham*, 29 do., 141; *Henderson vs. Morgan*, 26 do., 481.

Nor will actual notice protect the mortgagee. *Porter vs. Dement*, 35 Illinois, 478; *Sage vs. Browning*, 51 do., 217.

The effect of omission to record until the four months, an instrument executed and delivered prior to the four months has recently been considered by the Illinois Supreme Court, in *Seaver vs. Spink*, reported in 8 Bankruptcy Register, 218; to appear probably in 59 Illinois. The court

[1] *Bean vs. Brookmire*, American Law Register, March, 1871.

holds that a deed made by a bankrupt more than four months prior to the commencement of bankruptcy proceedings, which is valid without being recorded as between grantor or grantee and against purchasers with notice, cannot be avoided by the assignee because not filed for record until within the four months; that the fact that the deed was not acknowledged made no difference under the Bankrupt Act, the acknowledgement not being essential to its validity.

The distinction is to be borne in mind, however, that the above was a deed of real estate under the laws of Illinois, whereas a chattel mortgage in the same state is void as to creditors even with notice, unless acknowledged and recorded in conformity with the statute. [*Reporter*.

THE FAVORITE.

DISTRICT COURT.—EASTERN DISTRICT OF WISCONSIN.—APRIL 1871.

IN ADMIRALTY.

EXCEPTION OF DANGERS OF THE RIVER.

1. The exception in a bill of lading of unavoidable dangers of the river, relieves the carrier from liability for loss of the contents of a barge broken into by a sunken log or stump, concealed from view and not even marked by a ripple in the water, the steamboat and barge in tow pursuing the usual and proper course, no obstruction at that point being known to river pilots, and there being no proof of negligence or unskillfulness on the part of the master or crew, nor of any unseaworthiness of the steamboat or barge.

This was a libel by Joseph Reynolds and Jerome G. Swart, against the steamer Favorite, for the value of 6,661 bushels of wheat shipped by them at Minneiska, Minn., on a barge in tow of the Favorite, to be delivered at La Crosse, Wis. In the bill of lading the exception was of "unavoidable dangers of the river and fire only."

The facts are further stated in the opinion of the Court.

N. J. Emmons, for libellants.

J. W. Cary, for respondent.

MILLER, J.—The libellants charge that, through the unskillfulness, carelessness and negligence of the master and crew of the steamboat, the wheat was wetted and lost.

The answer sets forth, that the barge, in tow of the steamboat, at a point in the Mississippi river known as the crossing to the head of Argo island, and while proceeding down the river, struck on an obstruction in the river, supposed to be a

sunken log or a trunk of a tree, hidden from view and below the surface of the water; that thereby the barge was injured and caused to leak, and immediately filled with water and sunk in about three feet ten inches of water, whereby the wheat in the barge became wetted and damaged. And the charge of unskillfulness and negligence is denied.

There is no proof of negligence or unskillfulness on the part of the officers and crew. Nor is there any complaint of want of care of the cargo after the accident, or of unseaworthiness in any respect of the steamboat or barge.

The accident happened about 12 o'clock on a clear day in the month of October. The steamboat, with two barges in tow laden with wheat, was crossing the Mississippi river, quartering, from the Wisconsin to the Minnesota shore, above the head of Argo Island, at the rate of about six or seven miles an hour. The larboard barge struck a hidden obstruction in from three feet six inches to four feet of water. The fleet was pursuing the usual course of steamboats at that time, in the middle of the channel, about midway between the two shores. The obstruction did not make any break or visible ripple in the water. The collision with the obstruction, supposed to be a log or a stump, rounded to the boat and barges. And upon having straightened up and headed down stream, slivers and chips came to the surface from the stern of the larboard barge. In the afternoon, while the men were at work on the barge endeavoring to secure from damage as much of the wheat as possible, the two pilots, in a light skiff, went above the place of the accident and dropped down with the current, sounding the bottom with a pole as they floated down. They discovered something solid, supposed to be a stump with roots at one end, down stream. The pilot is of the opinion that the stump could not have been there very long, as it had not been known to pilots—and he had run over that ground—and other boats, drawing more water than the Favorite or barges, had been daily passing there, which might have struck the stump, if it had been there any great length of time.

The exceptions in the bill of lading are "the unavoidable dangers of the river and fire." The answer states that "the barge struck an obstruction in the river, supposed to be a sunken log or trunk of a tree, hidden from view and below the surface of the river."

There is no essential difference between an exception in a bill of lading, of unavoidable dangers of the river, and of dangers of the river; for the carrier must use all reasonable caution in the navigation of his boat or vessel to avoid accidents. These must include risks arising from natural accidents peculiar to the river, which do not happen by the intervention of man, nor are to be prevented by human prudence, and which no ordinary skill could anticipate or evade. Those words exonerate the carrier for liability for a loss arising from a collision, in the absence of fault on the part of the master and crew, and from hidden and unknown obstructions in a river, such as logs or stumps.

On full examination and consideration of the pleadings and proofs, I conclude that the claimant has brought itself within the exception on the bill of lading of "unavoidable dangers of the river," and that the libel should be dismissed.

Striking on a snag or rock not known to the master, nor generally known, is *prima facie* an inevitable accident. *Williams vs. Grant*, 1 Connecticut, 87; *Pennewill vs. Cullen*, Harrington, 238. [*Reporter*.

THE MOLLIE MOHLER.

DISTRICT COURT.—EASTERN DISTRICT OF WISCONSIN.—APRIL, 1871.

IN ADMIRALTY.

NEGLIGENCE IN RUNNING BRIDGE.

1. A steamboat with loaded barges in tow descending the Mississippi river about night-fall, the general bent of the weather being tempestuous, is in fault for running bridge piers; and the fact that the wrecking of a barge by collision with a pier was caused by a gust of wind does not relieve the liability.

2. The carrier, in order to avail himself of the exceptions of "dangers of navigation," must show due diligence and proper care to avoid the accident, and that it was unavoidable.

3. The burden of proof for this purpose is upon the carrier.

This was a libel by the Home Insurance Company, insurer, against the steamboat Mollie Mohler, to recover the value of 700 bags of wheat, shipped on the 12th day of May, 1866, at Mankato on the Minnesota river, on the barge Erickson, in tow of the steamer, to be delivered at St. Paul in good order, "dangers of fire and navigation only excepted." The wheat, having been damaged and lost to the owner, was surrendered to the company. Negligence, carelessness and unskillfulness of the master and crew of the boat were alleged in the libel, and denied in the answer.

Emmons & Van Dyke, for libellant.

J. W. & A. L Cary, for respondent.

MILLER, J.—It is confessed in the answer that the barge in tow of the steamboat was sunk in the Mississippi river, whereby the wheat was lost to its owner. And it is alleged in the answer, that the steamboat and barge proceeded on their voy-

age without accident until they reached the port of St. Peter, where they took in tow another barge called Eclipse, loaded with wheat, and then proceeded to the port of Belle Plains, where they took in tow another small barge called the Banty, also loaded with wheat. They proceeded without interruption or accident until on the 14th May, at about eight o'clock in the evening, when they reached a point in the Mississippi river about two miles above St. Paul, where there were several stone piers erected for the purpose of a railroad bridge across said river. The answer further states that just before they reached the piers, and while proceeding with due care and caution, the steamboat and barges being in the widest and best channel of the river, and the master and his mariners and servants being respectively in their proper places, a strong gust or gale of wind coming from a southerly direction suddenly arose and struck the steamboat and barges with great force and violence, so much so as to change their course, notwithstanding the best efforts of the master and mariners to keep them in their course. The wind, with the current of the river, which sets towards the middle of the piers, drove the steamboat and barges towards the middle pier, and in spite of the best efforts of the master and crew, the barge Eclipse struck the middle pier with great violence, which stove a hole in its side, by reason whereof it filled with water and sunk immediately; that the jar caused by the striking of the barge Eclipse against the pier, and the consequent sudden stoppage of the steamboat and barges and the swift current of the river, caused the barge Erickson to careen and fill with water, and sink.

It appears from the evidence, that the barge Eclipse was on the larboard side of the steamboat, the Erickson on the starboard side of the boat, and the Banty also on the starboard side, at the stern of the Erickson, following right after. The steamboat was 125 feet in length, 23 feet beam, had two engines and two boilers and stern wheel; and was staunch and able to handle the barges. The barges were not overloaded, were sufficient for the trade, and in good handling order. The boat and barges arrived at Mendota, the junction of the Minnesota

and Mississippi rivers, about an hour before sundown on the 14th of May. The wind blowing hard that afternoon they remained at that port for it to lull, so that they might run the bridge piers at that place.

The wind having lulled so as to enable them to run those piers, they put out for St. Paul about sundown. The wind being south-easterly on the Mississippi river, they passed down on the right hand side of the river for about five miles, under the lee of continuous high bluffs, when they crossed over to the other side about the ferry landing, half a mile above the bridge piers, where the accident occurred, and there they encountered a high wind blowing in squalls or gusts. The water clear across the river was ten feet deep. They could have landed between the ferry and the cove, more than a quarter of a mile above the piers. There was no difficulty in making a landing near the ferry. The wind was blowing hard in gusts or squalls from the south-east, and continued so until the collision took place. They made no effort to land, but proceeded towards the piers, claiming the privilege of a descending boat to pass an ascending boat on the starboard side, in her efforts to run the piers. They made no effort to back, or head to the shore, doing nothing but to run the piers against the gusts or squalls of wind, striking broad-side, about eight o'clock at night.

The distance between the piers was 165 feet and the breadth of the steamboat and tow was 65 feet. There cannot be fault found in the attempt to run the piers within this space, nor in the management of the boat at the time, nor with the conduct of the master and crew, as they all seem to have been at their respective posts of duty. The fault lies in not making a landing on discovering the boisterous state of the weather while crossing the river to the left hand bank, where there were two landing places, or putting back. The event cannot sanction the excuse of a sudden gust of wind as the cause of the collision. The master was admonished half a mile above, to secure his boat and tow by turning back or effecting a landing, and not to attempt running the piers at nightfall, while the general bent of the weather was tempestuous and boisterous.

It is incumbent on the master, in order to bring himself within the exception in the bill of lading, "of dangers of navigation," to prove that due diligence and proper skill were used to avoid the accident, and that it was unavoidable. The carrier must satisfy the court that there was no default on his part, and that every reasonable effort was made to avoid the accident. The burden of proof is on him to bring himself within the exception. When a collision or loss occurs, in the absence of fault on the part of the carrier, under circumstances beyond his control from *vis major*, as from storm, or waves, or reflex of the tide, or lightning, he is not held liable even on a clean bill of lading. In the case of the *Lady Pike*,[1] the boat towing three loaded barges down stream, on appproaching the same bridge piers as in this case, too closely to back or stop, one of the barges was driven against a pier by a sudden and unanticipated gust of wind. I decreed that the carrier was not liable for the loss of the cargo of the damaged barge. In that case the accident could not be avoided. In this case the master was admonished in time by the boisterous and tempestuous state of the weather not to run the piers, but to make a landing or put back, either of which he could have done nearly half a mile above the piers. In the opinion in the case of the *Lady Pike* I remark, "if the piers had been approached under a high wind, the boat should be condemned for unskillfulness of the officers; but there was a calm until the approach to the piers was too close to admit of avoiding the effect of an unanticipated and sudden gust of wind." See also *Amies vs. Stevens*, 1 Strange R., 128. The collision with the pier was the result of recklessness on the part of the master, and the decree must be for the libellant.

[1] *Ante*, p. 141. [*Reporter*.

THE MILWAUKEE.

DISTRICT COURT.—EASTERN DISTRICT OF WISCONSIN.—APRIL, 1871.

IN ADMIRALTY.

1. SPEED of TOW.—Seven or eight miles an hour is not a proper rate of speed for a steamboat having barges in tow, at a dangerous point on the Mississippi river.

2. FOG WHISTLE.—Steamboats on the Mississippi river are in fault for neglecting the rule for the government of pilots, which requires steamboats running in a fog to sound the steam whistle at intervals not exceeding two minutes.

This was a libel by the Security Insurance Company, insurer, against the steamboats Milwaukee and Imperial, to recover the value of 5,521 bushels of wheat, shipped at St. Paul, Minn., by John Robson on barges in tow of the steamer Imperial, and lost by collision with the steamer Milwaukee. The wheat was to be delivered in good order at the port of Dunleith, in the state of Illinois, "unavoidable dangers of the river and fire only excepted."

The facts are stated in the opinion of the Court.

Emmons & Van Dyke, for libellants.

John W. & A. L. Cary, for respondents.

MILLER, J.—The Imperial, with her barges, was compelled to make a landing at Brownsville, about twelve miles below La Crosse, and remain there over night, on account of a fog. On the morning of the 13th of September they left that port and proceeded down the river for about two miles, to Coon Slough where the Minnesota shore makes a sharp projecting point, causing the river to cross to the Wisconsin shore. By

reason of this bend the channel beyond the point cannot be seen until the point is passed. The pilot discovered a fog hanging over the point in the slough.

The steamboat Milwaukee was on a trip from Dubuque up to St. Paul. On the 13th of September, early in the morning, the weather being thick and foggy, the steamboat laid up near the elbow of Coon Slough. About eight o'clock in the morning, the fog having cleared away somewhat, she proceeded on her voyage. For some distance there was some fog, then the river became comparatively clear of fog, and the pilot could see from half to three-quarters of a mile ahead, except when intercepted by an occasional bank of fog. And as the steamboat Milwaukee approached the bend in the river she discovered a bank of fog resting over the river, about 150 or 200 yards ahead; and at about the same time she discovered the steamboat Imperial with three barges in tow, emerging from the bank of fog, on her course down the river. The steamboat Milwaukee struck the starboard side of the starboard barge, the Robert C. Rodgers, causing the cargo of wheat to be lost in about eight feet of water.

The libel and answer both aver that their respective boats were running slowly and cautiously, on account of a fog hanging over the river. The fog was partially lifted where the sun reached it, but in the shade it still hung over the river. The evidence is, that both boats were running about seven or eight miles an hour, which I consider much too high a rate of speed in that state of the weather, and particularly at that difficult point of navigation.

Rule seven, for the regulation of pilots on rivers, requires the pilot of a steamer running in a fog, or thick weather, to sound his steam whistle at intervals not exceeding two minutes. It is apparent from the evidence that the Imperial had not sounded her whistle within several minutes before the collision. And it is certain that for some time before seeing the fog bank, the Milwaukee did not sound her whistle. If the required signals had been given, it is highly probable that the boats would have avoided the collision. Stopping their

respective engines while running into each other was too late. I consider that both steamboats are in fault, for running at too high a rate of speed while the river was not clear of fog, and for not blowing their steam whistles every two minutes, as required by the rules.

Reference is made to a commissioner to ascertain the amounts to be decreed.

BROMLEY, Assignee, &c., vs. SMITH.

District Court.—Eastern District of Wisconsin.—April Term, 1871.

In Bankruptcy.

ASSIGNEE CANNOT AVOID USURIOUS MORTGAGE.

1. The assignee in bankruptcy of one of two joint makers of a note and mortgage, cannot maintain a petition to declare the securities void for usury.

2. Privilege for borrower alone.—The assignee is not a borrower within the meaning of the statute of Wisconsin concerning usury, and the power to institute proceedings to obtain a forfeiture is a privilege conferred by the act upon the borrower. The assignee, to obtain relief, must tender the money actually borrowed.

3. There is not in the Bankrupt Act any grant of a power or right to institute proceedings by petition for the recovery of a statutory forfeiture not claimed by the bankrupt either before or after the proceedings in bankruptcy.

4. The assignee may require the creditor to prove his debt, reciting the security and setting forth the consideration, and contest the claim for any usurious surplus.

5. Mortgagor not Competent Witness against Executors.—Although neither of the mortgagors united in the petition nor were parties to the record, yet under the act of Congress of March 3, 1865, they are not competent witnesses against the executors of the opposite party, as to transactions with or statements made by the testator.

Bromley, Assignee, &c., vs. Smith.

This was a petition by Van Buren Bromley, assignee of Ellwood Loy, a bankrupt, praying an order of sale of certain real estate of the bankrupt, and also setting forth a mortgage of said real estate, given by Ellwood Loy and David M. Loy to Dominicus Jordan, to secure their note for $5,000, with a prayer that the same be declared by the court to be void for the usury therein stated. The mortgagee having died some time after the date of the mortgage, this proceeding was instituted against his executors.

The statute of Wisconsin (Taylor's Ed., chapter 61, § 4,) provides: "All bonds, bills, notes, assurances, conveyances, and all other contracts and securities whatsoever (excepting bottomry and respondentia bonds and contracts), and all deposits of goods, or anything whatsoever, whereupon or whereby there shall be reserved, secured or taken any greater sum or value for the loan or forbearance of any money, goods or things in action, than is above prescribed (ten per cent.) shall be void, whether the sum or value so secured, received or taken shall appear in or from such bond, bill, note, assurance, conveyance or contract, or otherwise."

A. Finch, for petitioner.

H. L. Palmer, for defendants.

MILLER, J.—The facts stated present a case of usury, and if established by proof would render the mortgage void, under the law of this state in force at the date of the mortgage. To prove the usury stated in the petition, depositions of the mortgagors were offered to be read. The reading of these depositions was objected to, on the ground that, by the death of the mortgagee, these persons were not competent witnesses.

It is enacted by Congress[1] that in the courts of the United States there shall be no exclusion of any witness in civil actions because he is a party to, or interested in, the issue tried. But in actions by or against executors, administrators

[1] 18 U. S. Statutes at Large, 351, 533.

or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with, or statement by, the testator, or intestate or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court.

Ellwood Loy and David M. Loy are parties to the contract with Dominicus Jordan. This proceeding in the name of the assignee is intended virtually as an action in relief of the mortgagors, and in which judgment, it is claimed, may be rendered for or against the executors of the mortgagee. These persons propose to testify as to the transactions with the deceased, and of the statements made by him in relation to the alleged usury. If they were permitted to give evidence to establish the alleged usury, a decree rendered on their evidence according to the prayer of the petition would be claimed to be a discharge of the debt as to David M. Loy, and might relieve Ellwood Loy of his bankruptcy. These mortgagors are, in this aspect of their relation to this proceeding, virtually parties. I think they come within the intent and scope of the act of Congress, and that their depositions should be excluded. This provision of the act is for the protection of the estates of parties unable from death or infancy to testify, and it should be liberally construed.

The statute law of this state in force at the date of the note and mortgage, and under which this petition is brought, favors suits or actions brought or defended by borrowers for violation of its provisions against usury. It is alleged in the answer of defendants that the assignee in bankruptcy of the mortgagor is not a borrower entitled to institute proceedings for a forfeiture of the debt. It is also pleaded that the assignee is not the borrower, and cannot institute proceedings for a forfeiture without first paying or tendering the amount borrowed. The assignee in bankruptcy becomes vested with all the estate of the bankrupt not exempt, and must be considered in the light of a purchaser.[1] The title to the

[1] *In re Griffiths*, 8 Bankrupt Register, 179; *Potter vs. Coggeshall*, 4 do., 19.

mortgaged premises is vested in the assignee subject to the mortgage. If the assignee is not the borrower in the sense of the law, but a purchaser, and if competent to institute proceedings for a decree of forfeiture of the mortgaged premises for usury, or for relief from the usurious contract, he should first do equity by paying or tendering the money borrowed. The power to institute proceedings for a forfeiture under the law against usury, or for a relief from a usurious contract, without first paying or tendering the money borrowed, is a privilege conferred by the act upon the borrower alone.

I do not see in the bankrupt act a grant to the assignee of a bankrupt of any right or power to institute these proceedings for a statutory forfeiture not claimed by the bankrupt either prior or subsequent to proceedings against him in bankruptcy. Neither the bankrupt nor his co-mortgagor are parties to the record. Notwithstanding the proceedings in bankruptcy of Ellwood Loy, David M. Loy might have brought a bill or suit in his own name and in that of the bankrupt or his assignee, or both, for relief under the law against usury. I do not think the assignee can sustain this petition.

The assignee, through the court, may require the creditor to prove his debt in the usual form, reciting the security and setting forth the consideration, and if a larger amount is claimed than was actually borrowed, with lawful interest, he may contest the claim for the usurious surplus. Or if a mortgage should be a device either to defraud creditors or to give a prohibited preference to a creditor, the assignee may proceed by action at law, or by bill in chancery, on behalf of the general creditors of the bankrupt.

The petition is dismissed.

In re BRADLEY.

DISTRICT COURT.—EASTERN DISTRICT OF WISCONSIN.—APRIL TERM, 1871.

IN BANKRUPTCY.

1. HOLDER OF FIRM NOTE INDORSED BY INDIVIDUAL PARTNER, MAY PROVE AGAINST BOTH ESTATES.—A bank having discounted a note made by a firm to one of the partners, and indorsed by him, is entitled to prove the debt against the estate of the firm and of the individual partner.

2. The form of the contract or obligation of the maker and indorser should not prejudice the legal rights of a creditor claiming distribution of assets in bankruptcy.

The Firm of H. C. Bradley & Co., composed of Henry C. Bradley, Henry A. Williams and Charles Campbell, were adjudicated bankrupts in this court on their own petition.

One of the debts proven against the firm, and also against Charles Campbell, was a note for $1,000, signed in the firm name, payable thirty days after date to C. Campbell or order, at the National Exchange Bank of Milwaukee, and indorsed to the bank by Campbell. The note, not being paid at maturity, was protested. The debt was proved by the bank both as a debt of the firm and of Charles Campbell. Objection was made by the creditors of Charles Bradley to this last claim, on the ground that the debt was only provable against the assets of the firm.

The cashier of the bank testified that the bank frequently loaned money to H. C. Bradley & Co., either on collaterals or on the indorsement of Campbell, which was considered good, and added to the security of the firm. The note was discounted by the bank for the firm of H. C. Bradley & Co.

Palmer, Hooker & Pitkin, for creditors.

Jenkins & Elliott, for assignee.

MILLER, J.—It is apparent that the note is a debt of the firm, and that the indorsement created a personal liability of Campbell, and that such was the understanding of the parties when the note was discounted by the bank. The indorsement of Campbell was accepted in lieu of collaterals. The protest and notice bound Campbell as an indorser.

The rule in England excluded the double proof of a debt, as claimed in this case, but not with the approbation of the courts of the realm. In several cases the rule was enforced while the judges in their opinions doubted its soundness or propriety. There is no good reason for requiring a creditor to elect of which fund he will claim his dividend.

The bankrupt acts of 1841 and of 1867 are similar in their provisions in regard to distribution of assets in cases of bankrupt firms and individuals. The English rule has not been adopted in the United States. In the matter of *Peter Farnum and others*.[1] it is decided by the District Court of Massachusetts that under the act of 1841 where a partnership and the individual members thereof were declared bankrupts, a creditor who presented a bill of exchange drawn by the firm and indorsed by one of the partners, was entitled to a dividend from the joint estate of the firm, and the separate estate of the partner. The same ruling was made, under the same act, by the Circuit Court for Massachusetts District.[2] Similar adjudications have been made under the act of 1867. In the case of *Charles H. Mead, Assignee, &c., vs. The National Bank of Fayetteville*,[3] the bankrupts had been partners in business, and their indebtedness consisted in part of sundry notes of the firm as maker, with the name of one of the firm on each as indorser. The court, in an elaborate opinion by Judge Hall, came to the conclusion and ordered that the notes were provable both against the firm and each individual indorser.

[1] 6 Law Reporter, 21.

[2] *Ex parte Babcock*, 3 Story, 393; also Story on Partnership §§ 376 and 377.

[3] 6 Blatchford, 181.

The same principle is decided by Judge Blatchford, of the Southern District of New York in *In re Bigelow*.[1]

I think the court has no judicial power to restrict the right of a creditor to pursue the joint and several debtors for the collection of his debt in any manner known to the law. Nor can the mere form of the security or evidence of indebtedness control in respect to the question whether the debt must be proven in bankruptcy proceedings against the partnership, or against the separate estate of one of the firm. The creditor must be permitted to prove his debt according to the contract, and to receive dividends from both joint and individual assets.

The objection is overruled.

Consult *In re Knight*, following case, where the English rule, in cases where there are no partnership assets and no solvent partner, is approved, and the Massachusetts cases examined. [*Reporter*.

[1] 2 Bankrupt Register, 121.

In re KNIGHT.

CIRCUIT COURT.—EASTERN DISTRICT OF WISCONSIN.—APRIL TERM, 1871.

IN BANKRUPTCY.

1. PARTNERSHIP AND INDIVIDUAL DEBTS—DISTRIBUTION.—The English rule in bankruptcy that where there are both partnership and individual debts, but no partnership assets and no solvent partner, the debts of the firm and of the members can be proved, and the estate is to be distributed *pari passu* among the creditors, approved and adopted.

2. This rule applies, even though the total assets consist of property sold by the individual creditors to the bankrupt.

3. Various Massachusetts cases examined and disapproved.

4. The Federal Courts, in construing the bankrupt law, are not bound by the decisions of a state court on a similar insolvent law.

Appeal from an order of the District Court denying a petition of Jonathan Richards, and others, creditors of C. Peter Knight, bankrupt, to be paid from the individual assets of the bankrupt, in preference to the creditors of the firm, there being no firm assets.

The bankrupt, Knight, and one Hilke, were engaged in business in March, 1869, at Watertown, Wisconsin, as partners, and filed their petition in bankruptcy. Their assets were about $8,000 and their debts about $9,000. In May, 1869, Knight effected a compromise with the creditors of the firm at fifty cents on a dollar. Twenty-seven and a half per cent. of this sum was secured by the indorsement of two persons, to whom Knight and Hilke, with the assent of the creditors of the firm, executed a chattel mortgage on the firm property. This property was sold from time to time and the proceeds paid over to the mortgagee. These mortgaged goods were kept distinct from some belonging to Knight, which he purchased afterwards. Hilke was insolvent, and there was

no joint property of the firm. Afterwards Knight did business on his own account, and incurred the indebtedness to the petitioners for goods purchased, and in November, 1869, they, as such creditors of Knight, filed a petition in bankruptcy against him, and he was adjudged a bankrupt. There was about $1,500 in the hands of the assignee of Knight, derived wholly from the property owned by him, while he did business on his own account. Certain creditors of Knight and Hilke who had taken promissory notes of them under the compromise, proved their debts against Knight, the bankrupt. The petitioners claimed the right to be paid in preference to such creditors.

Palmer, Hooker & Pitkin, for creditors, cited

Bump on Bankruptcy, p. 188–9; *In re Downing*, 3 Bankrupt Register, 182; *In re Melick*, 4 Bankrupt Register, 26; *In re Frederick Jewett*, 1 Bankrupt Register, 130; *Ex parte Weston*, 12 Metcalf, 1; *Crocket vs. Jewett*, 2 Bankrupt Register, 75; *In re Hartough*, 3 Bankrupt Register, 107; *In re Winkens*, 2 Bankrupt Register, 113; *Hartz & Puiner*, 1 New York Legal Observer, 39; *Somerset Potters' Works vs. Minot*, 10 Cushing, 592; *Catskill Bank vs. Hooper*, 5 Gray, 574, 583; *Howe vs. Lawrence*, 9 Cushing, 553; *In re Byrne*, 1 Bankrupt Register, 122.

Carys & Cottrill, for bankrupt.

DRUMMOND, J.—There is no controversy about the rule in equity or bankruptcy in England, in such cases as this—perhaps it might be more properly called an exception to the rule—that where there are partnership and individual debts, and there are no partnership assets and no solvent partner, the debts of the firm and of the individual member can be proved, and the estate is to be distributed *pari passu* among the creditors. It is partly on the ground, that although it is a debt of the firm it is still a debt against each individual member of the firm, for the satisfaction of which the property of each is responsible, and that being the only source

to resort to for the payment of the debt of the firm, it should be appropriated as well to pay the debts due from the firm as from the individual members. This being the well established rule upon the subject, the only difficulty arises from some decisions which have been made in Massachusetts under the provisions of their insolvent law, which, it must be said, is substantially the same in this respect as the 36th section of the Bankrupt Law of the United States.

The decisions have been made in Massachusetts, under the 21st section of chapter 163 of the Insolvent Law of 1838, which declared that when two or more persons who are partners become insolvent, a warrant is to be issued, upon which the joint stock and property of the company, and the separate estate of each of the partners, shall be taken—with certain exceptions. And then the section states that the assignee shall be chosen by the creditors, and shall keep separate accounts of the joint stock of the company and of the separate estates of each member thereof, and the net proceeds of the joint stock shall be appropriated to pay the creditors of the company, and the net proceeds of the separate estate of each partner shall be appropriated to pay the separate creditors, and if there is a balance of the joint stock after the payment of the joint debts, it shall be divided and appropriated among the separate estates of the parties according to their respective rights and interests therein, and the sum so appropriated shall be applied to the payment of the separate debts. This seems to be the provision of the law of Massachusetts upon the subject of insolvency which is referred to in the case of *Howe vs. Lawrence*, 9 Cushing, 553. That was a case where one of the partners had made a *bona fide* sale for a valuable consideration, of all his interest in the firm property, to the other member of the firm. And there the Supreme Court of Massachusetts held that the transfer being a valid one, the separate creditors were entitled to be first paid.

On page 559, the Court says :

"The remaining question presented by the petitioners is as to the right of the joint creditors of the firm to prove their debts

against the separate estate, and take dividends thereon *pari passu* with the separate creditors. This claim is founded upon the recognized exception to the general rule of applying joint estate to the payment of joint debts, and separate estate to the payment of separate debts, which has been established by the English courts in bankruptcy. That exception is, when there is no joint estate and no solvent partner, the joint creditors are allowed to prove and share equally with the separate creditors in the separate estate. It is a sufficient answer to this claim of the petitioners, that the statute of 1838, chapter 163, section 21, recognizes no such exception to the rule therein prescribed for the distribution of the assets of insolvent debtors. The rule is distinct and peremptory, requiring the net proceeds of the joint stock to be appropriated to pay the creditors of the firm, and the net proceeds of the separate estate of each partner to be appropriated to the payment of the separate creditors."

"If there is no joint estate," the court says further on, "and no surplus of the separate estate after paying the separate debts, the creditors of the partnership can receive no dividend."

Now, it must be said that the Supreme Court of Massachusetts, in this case, considered this 21st section of the law of 1838, as making provision for the case where there is no joint estate, but only the separate estate of one of the members of the firm. And yet it would seem, at first blush, that this statute contemplated the case of a joint and separate estate. It declares that upon the issue of the warrant the joint stock and property of the company and the separate estate of each of the partners shall be taken. Of course if there is no joint property it cannot be taken. If there is no separate property, that cannot be taken. And the whole scope of the section seems to proceed on the hypothesis that distribution is made of joint and separate property.

But I am not prepared to admit the reasoning of the Supreme Court of Massachusetts on this point. They say in this same opinion: "The rule fixed by the statute may sometimes operate harshly, as all general rules do; but it is definite,

clear, and easily applied. The exceptions to it are artificial and refined, leading to nice and subtle distinctions, and sometimes operating with great inequality and injustice." In the case of partnership property turned over to one of the members of the firm even in good faith and for a valuable consideration, and that member of the firm owing a large debt on his individual account, with which the property of the firm and the firm itself has nothing to do, it would seem to be rather hard to take the property which belonged to the firm, and which ought to go to pay the debts of the firm, and distribute it among the creditors of the individual member to whom the property of the firm had been sold. That is not the case before the court, it is true. But that case might occur, and if the rule stated by the Supreme Court of Massachusetts is the true one, it certainly would operate with peculiar hardship.

There is a case decided in 10 Cushing, 592, *The Somerset Potter Works vs. Minot*, one head note of which is: "*It seems*, that if there be no joint property, the creditors of the firm can not, under that statute (the statute of 1838), share in the separate property *pari passu* with the separate creditors." The court, in that case, on page 597, says: "Our statute upon this subject must be our guide. * * This matter, which, independent of the statute, might have been a subject for controversy, has become part of our written code, and as such, as respects this commonwealth, overrides all questions of expediency or the fitness ot things. It takes the subject in its general bearings, looking at it as a whole, and prescribing a uniform rule for all cases. Like all general rules, it may in particular cases work an apparent injustice, or result in inequality as respects the different classes of the creditors. The statute under which these proceedings in insolvency were instituted, and by virtue of which the assignees hold these assets, has declared that in cases where proceedings are thus instituted against a co-partnership, all the estate of the partnership, and all the separate estate of the individual partner, shall pass into the hands of the assignee."

In that case the decision is placed upon the ground that the

proceeding in insolvency was instituted against the partnership. The language of the statute to which reference has been made, is, "when two or more persons who are partners become insolvent."

Let us now refer to the 36th section of the bankrupt law, which provides that where two or more persons who are partners in trade shall be adjudged bankrupts, either on the petition of such partners, or any one of them, or on the petition of any creditor of the partners, the warrant shall issue. And then the section follows substantially the language of the 21st section of the statute of Massachusetts of 1838. And there would seem to be no mistake as to the phraseology of this provision of the bankrupt law, and the particular circumstances in the mode of distribution pointed out in this section, and that it only applies where "there are two or more persons that are partners in trade, and who have been adjudged bankrupts on the petition of such partners, or any one of them," etc., and where there is separate and joint property. And while we pay all due respect to a decision of the Supreme Court of Massachusetts on the provision of its insolvent law, which is substantially similar to the section contained in the bankrupt law of 1867, still we are not absolutely bound by it in administering a general system of bankruptcy under an act of Congress, and for the whole country.

Now, as I have said, a debt of the firm is a debt against each individual member of the firm, and for which the separate property of each member can be taken. In that sense it is separate as well as joint, and each partner is individually liable. We cannot make any rule, or adopt any exception to a rule, which will not occasionally work hardship, looking at the equities of a particular case. I have supposed a case where the rule, as stated by the Supreme Court of Massachusetts, would work hardship upon the joint creditors of the firm, if the separate property in the case supposed is given to pay the individual debts of one of the members of the firm. But we have to adopt some rule or exception

which, on the whole, is sound and will promote the greatest equity and justice. And the reason in this case why the petition cannot be sustained, is because, though it may be true that the property of the petitioners went to make up the assets now in the hands of the assignee, when the petitioners sold the property to the bankrupt, their interest therein ceased; and thenceforth they had nothing more to do with the property as such. All that they had to represent their property was a claim or debt against the bankrupt. It is like the ordinary case of a person who is largely indebted, and to whom a very considerable amount of property may be sold while he is insolvent; he may be put into bankruptcy, and the only assets that may go into the hands of the assignee may be this property or its proceeds, which has been recently sold by the creditor—and yet it must necessarily be distributed among all the creditors of the bankrupt, although it came from only one of them. And the reason is, because when he parted with his property he had nothing but a claim or debt against the bankrupt, and the creditors were then all upon an equality in the eye of the law—the man who has an old claim and whose property has been disposed of years before, as well as the man who has a recent claim,and whose property is in the hands of the assignee.

It is upon this principle that we can sustain a rule of this kind. And it is clear that we can adopt no other. This is the principle of the bankrupt law.

The 27th section of the bankrupt law says that all creditors whose debts are duly proven and allowed, shall be entitled to share in the bankrupt's property and estate *pro rata*, without any priority or preference whatever—with certain exceptions. Now, is not this a debt against the bankrupt? These persons have put in their claims, and proved their debts for notes against the bankrupt and Hilke—still it is always a debt against Knight, the bankrupt, for which he is liable, and the fact that it was once a firm debt can make no difference. It is still a debt against the bankrupt. Therefore taking the general scope of the bankrupt law, and interpreting the 36th and 27th sections together, and under the light of the adjudi-

cations in equity and in bankruptcy in England, I think we are not bound to follow the decision of the Supreme Court of Massachusetts—even though it might be considered as settling the law upon the construction to be placed upon the 21st section of the law of 1838 of that state.

Jewett's case, which was referred to, and is reported in the 1st volume of the Bankrupt Register, page 130, was decided upon the ground that that there was no joint property to which the joint creditors could apply, and that the only source of payment was the particular fund; and the court held that the partnership creditors were entitled to share *pari passu* with the individual creditors. Some criticism has been made upon this decision in the case of *In re Byrne*, 1 Bankrupt Register, 122; and the Register in that case seemed to be of the opinion that the rule, as stated by that court, was not the correct rule. But in that case one of the partners had transferred his interest in the partnership effects to his co-partner, and the Register held that that was done in contemplation of filing his petition in bankruptcy, and that such transfer was void, and a fraud upon the creditors of the partnership. And in that case it did not appear whether there was any joint estate or not.

In the case of *W. E. Downing*, reported in the 3d Bankrupt Register, page 182, the court, in discussing this question, says that the 36th section of the bankrupt law contemplates the case of an attachment or seizure of joint and separate property of the bankrupt—in which opinion I entirely concur, because it is the natural and true construction of the 36th section.

So that, on the whole, admitting that these rules or exceptions occasionally work hardship, yet this rule, I insist, in the language of the Supreme Court of Massachusetts, is "simple, definite, clear, and easily applied," and that it works no greater hardship, certainly, than the rule adopted by that court. Take the case of Jewett which has been cited: in that case all the property of Jewett came from the firm; and to hold that, in that case, his individual debts should be paid out of

the property which had been received from the firm, and that the firm creditors should have nothing, would certainly have been a case of hardship. The answer to all this is—in one case as well as another—that the law looks upon the property as gone from the creditor when the sale is made, and that in the place of the property stands the mere claim of the creditor—and that the creditors are then upon an equality.

In deciding this case, I do not trench in any degree, or intend to do so, upon the rule which is founded in law, in reason, and in equity, that in the case of a partnership joint property should go to pay the joint debts, and the separate property to pay the separate debts.

The decree of the District Court will therefore be affirmed.

See *Murray's Assignee vs. Assignee of Dever & Murray*, 7 American Law Register, (O. S.) 34. That under certain circumstances a creditor may prove against both estates, see *Emery vs. Canal National Bank*, 7 Bankrupt Register, 217. *In re Bradley ante*, p. 515, preceding case. [*Reporter*.

EVANSVILLE NATIONAL BANK vs. METROPOLITAN NATIONAL BANK.

CIRCUIT COURT.—DISTRICT OF INDIANA.—MAY TERM, 1871.

1. BANK'S LIEN ON STOCK.—A transfer of stock in a banking corporation organized under the act of June 3, 1864, to a *bona fide* holder is valid, though the seller, or pledgor, be at the time indebted to the bank, and a by-law of the bank declared that no transfer of the stock by any share-holder indebted to the bank should be made, without the consent of the Board of Directors.

2. Such a by-law in effect attempts to create a lien upon stock for debts of the holder, and the result is the same as if a loan were made upon the security of the stock—a transaction forbidden by the 35th section of the act.

3. The principle announced in the case of the *First National Bank of South Bend, vs. Lanier* is decisive of this case.

Appeal from District Court.

This was an action by the Evansville National Bank, of Evansville, Indiana, to recover two hundred shares of its capital stock, pledged to the Metropolitan National Bank of New York city.

The Evansville National Bank was organized in January, 1865, under the Act of Congress, of June 3, 1864.[1] One of the articles of association provided that the directors might prohibit the transfer of stock without their consent. Accordingly a by-law declared that no transfer of the stock should be made, without the consent of the Board of Directors, by any share-holder who was indebted to the bank—and certificates of stock were to contain this provision. After the adoption of this by-law, Watts, Crane & Co., became the owners of one hundred and fifty shares of stock, and Crane, one of the firm, of fifty shares. Certificates were issued for these shares, in conformity with the above by-law.

Watts, Crane & Co., did business with the Evansville National Bank, and they were indebted to the bank from the

[1] 13 U. S. Statutes at Large, 99.

time they became holders of the stock, for money loaned upon bills drawn, indorsed, or accepted by them in the usual course of dealing.

On the 15th of September, 1866, they borrowed $30,000 of the Metropolitan National Bank, of New York, and they and Crane delivered their certificates of stock as a pledge to secure the money so borrowed, attaching to the certificates bills of sale with power of attorney for the transfer of the stock.

On the 15th of April, 1867, Watts, Crane & Co., became indebted to the Evansville National Bank, on an acceptance for $25,000. At this time, the Evansville Bank had no notice of the pledge previously made to the Metropolitan Bank. The members of the firm of Watts, Crane & Co., were declared bankrupts by the District Court of Indiana, March 3, 1868.

The District Court held that the pledge to the Metropolitan Bank was binding, notwithstanding the by-laws under which the Evansville Bank claimed a lien upon the stock.

Asa Iglehart, for plaintiff.

Hendricks, Hord & Hendricks, for defendant.

DRUMMOND, J.—The only question in the case is, whether this by-law was valid under the law of June 3d, 1864. The 8th section of that act authorizes the Board of Directors to make by-laws, but declares they must not be inconsistent with its provisions.

The 35th section declares that no association shall make any loans, or discount on the security of the shares of its own capital stock, nor be the purchaser or holder of any such shares, unless to prevent loss on a debt previously contracted in good faith.

The counsel for the plaintiff, in the able argument he has presented, claims that the operation of the by-law upon the shares of stock, because of the indebtedness of Watts, Crane & Co., and their transfer to the Metropolitan Bank, without the consent of the Board of Directors, was not a loan or discount made on the security of the shares, that there must be a

distinct assignment or hypothecation of the stock as security for a loan or discount made, and some authorities have been cited which seem to sustain that principle. But if a by-law declares in substance and effect, that for all loans or discounts made to the share-holder, a lien shall exist against his stock, the result would be the same as if there were a separate transaction and security given in each case. The share-holder always has the credit on the security of his stock, and thus the very object is accomplished which the 35th section sought to prevent, the absorption of the shares into the assets of the bank. And it will be observed that the law only allows the stock to be taken by the bank as security, or purchased or held to avoid loss on a debt *previously* contracted in good faith, and even then the stock is to be retained by the bank only a limited time.

An extended examination of the authorities cited by counsel is unnecessary, because in the case of the *First National Bank of South Bend vs. Lanier*, recently decided by the Supreme Court of the United States,[1] the question involved here is discusssed by that court, and a principle established that is decisive of this case.

In that case the bank had made a by-law, declaring that the stock of the bank should be transferable only on its books, subject to the provisions of the 36th section of the act of 1863[2] (by which a share-holder was prevented from transferring his stock when he owed the bank). The bank sought to avail itself of this by-law, notwithstanding the repeal of the 36th section, by the act of 1864, and the court held that that could not be done. This was in effect, deciding that no such by-law could be in force under the provisions of the act of 1864. The language of the court is: "Congress evidently intended, by leaving out "of the law of 1864 the 36th section of the act of 1863, to re- "lieve the holders of bank shares from the restrictions imposed "by that section. The policy on the subject was changed,

[1] 11 Wallace, 369.

[2] 12 U. S. Statutes at Large, 675.

"and the directors of banking associations were in effect "notified, that thereafter they must deal with their share- "holders as they dealt with other people. As the restrictions "fell, so did that part of the by-law relating to the subject fall "with them."

The decree of the District Court is affirmed.

This case was appealed to the Supreme Court, and affirmed by a divided court, and consequently no opinion was given.

A corporation has no lien at common law upon stock for a claim against the stockholder. *Steamship Dock Co. vs. Heron*, 52 Pennsylvania, 280; *Massachusetts Iron Co. vs. Hooper*, 7 Cushing, 188.

Nor any implied lien; and is bound to enter on its books a transfer of the stock made by the holder. *Heart vs. State Bank*, 2 Devereux's Equity R., 111; *Contra, Mechanics' Bank vs. New York & New Haven R. R. Co.*, 13 New York, 599; *Arnold vs. Suffolk Bank*, 27 Barbour, 424.

Lien may be sustained by proper clause in certificate of stock. *Vansands vs. Middlesex County Bank*, 26 Connecticut, 144; *Fitzhugh vs. Bank of Shepherdsville*, 3 T. B. Monroe, 126.

Or by provision in charter. *St. Louis Perpetual Ins. Co. vs. Goodfellow*, 9 Missouri, 149; *Cunningham vs. Alabama Life Ins. & Trust Co.*, 4 Alabama, N. S., 652; *Stebbens vs. Phœnix Fire Ins. Co.*, 3 Paige, 350; *Union Bank vs. Laird*, 2 Wheaton, 390; *Mechanics' Bank vs. Merchants' Bank*, 45 Missouri 513. See also *McCready vs. Rumsey*, 6 Duer, 574; *Merrill vs. Call*, 15 Maine, 428.

Where a bank has notice of an equitable transfer, not completed on its books, it is bound to respect it. *Conant vs. Seneca County Bank*, 1 Ohio State, 298; *Nesmith vs. Washington County Bank*, 6 Pickering, 324.

Lien given by charter cannot overreach a prior assignment so as to prevent its transfer. *Neale vs. Janney*, 2 Cranch, C. C., 188.

Bank may hold the whole of its debtor's stock. *Sewall vs. Lancaster* Bank, 17 Sergeant & Rawle, 285.

And dividends on such stock. *Hague vs. Domdeser*, 2 Exchequer, 741.

Assignee takes subject to the rights of the corporation under its charter, of which he is bound to take notice. *Reese vs. Bank of Commerce*, 18 Maryland, 272; *Brent vs. Bank of Washington*, 10 Peters, 610; *Union Bank of Georgetown vs. Laird*, 2 Wheaton, 390.

Lien is good as against purchaser at sheriff's sale, with notice. *Tuttle vs. Walton*, 1 Georgia, 4.

The Supreme Court of New York hold that under these acts of Congress a bank cannot by a by-law create a lien upon stock for the security of debts due from the stockholder to the bank. *Rosenback vs. Salt Springs National Bank*, 53 Barbour, 495; followed at a subsequent term in *Conklin et al. Assignee, &c., vs. Second National Bank*, do., 512

Evansville N't'l Bank vs. Metropolitan N't'l Bank.

Contra: In one of the earliest cases under the bankrupt law, Blatchford, J., ruled that a bank could maintain a lien on its shares of stock, as against the assignee in bankruptcy of the stockholder, to protect itself against loss. *In re Bigelow*, 1 Bankrupt Register, 202.

Though a certificate of stock contains a provision that the stock was not transferable until all the liabilities of the stockholders were paid, such a provision gives the bank no lien upon the stock for subsequent indebtedness, and is void under the act of Congress of June 3d, 1864. *Conklin vs. Second National Bank of Oswego*, 45 New York, 655. [*Reporter.*

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ACTS OF CONGRESS.—*See* STATUTES OF THE UNITED STATES.

ADMIRALTY.

1. ADMIRALTY JURISDICTION.—Under the decisions of the Supreme Court the admiralty jurisdiction of the district courts over all the navigable waters of the country must be considered as established. *Seven Coal Barges*, 297.
2. SALVAGE.—being a branch of admiralty jurisdiction, the district court has the same jurisdiction over a case of salvage on the Ohio river as on the Hudson. *Ib.*
3. WHAT CONSTITUTES.—It is sufficient that the property be exposed to a chance which might destroy it, and that the labor, at some personal risk, substantially contributes to the salvage. *Ib.*
4. The fact that the owner is in pursuit, unknown to the salvor, does not deprive him of his claim. *Ib.*
5. BARGES adrift on the Ohio river are a proper subject of salvage. *Ib.*
6. VESSEL HAVING LOST HER SIGNAL LIGHTS.—In a storm, and proceeding on her way with the prohibited white light, is not necessarily to be charged with all the damages in case of collision. *The Gray Eagle*, 25.
7. DUTY OF OTHER VESSELS.—The fact that she carried a light prohibited to vessels while sailing, does not of itself absolve other vessels from the observance of that degree of caution, care, and nautical skill which the exigencies of the case require. *Ib.*
8. Though a white light usually represents a vessel at anchor, the officers of an approaching vessel have no right to conclude that it always does. *Ib.*
9. MUST WATCH LIGHTS.—It was their duty, from the moment the light was seen, to watch it carefully in order to ascertain from its bearings whether the vessel was in motion; and if, in the exercise of ordinary nautical skill and care, this could have been done, and was omitted, and this omission contributed to the accident, then their vessel must share the loss, although the other vessel was in fault in running with a prohibited light. *Ib.*
10. A vessel is not under all circumstances required to come to anchor at night, when through misfortune she has lost her signal lights. In running, she is so far protected that every other vessel must be navigated with reasonable care, skill, and caution. *Ib.*

ADMIRALTY—*Continued.*

11. LIGHTS OF SAILING VESSEL.—A green and red light, placed in the center of a schooner, forward, and separated only by a board, do not fulfill the requirements of the act of Congress of April 29, 1864. The lights must be placed at the sides of the vessel. *The Empire State*, 216.
12. LOOKOUT.—When at the time of a collision with a propeller the mate was near the wheelsman, and they were the only persons on deck, there was, properly speaking, no lookout, and the schooner was in fault. *Ib.*
13. But, when they had seen the propeller, and recognized her as such, it being their duty to keep their course, it cannot be said that this want of a lookout in any degree contributed to the collision. *Ib.*
14. DUTY OF APPROACHING VESSEL.—Those on board the propeller having seen the schooner, but being uncertain as to her course, and not having clearly distinguished her lights until just before the collision, it cannot be said that they had all the information in regard to the course of the schooner which the proper lights would have furnished, and that their absence did not contribute to the collision. *Ib.*
15. The propeller, however, was bound to exercise the greatest care and vigilance, and, if necessary, check her speed; and also to watch the schooner with constant vigilance; if by doing this she could have avoided the collision, she is guilty of contributory negligence. *Ib.*
16. ENTERING HARBOR—JETTISON.—The captain of a propeller, having run more than a day without accurate means of determining his position, supposed that the port of Waukegan, which he reached during the night in a fog, was Chicago, his destination. In attempting to enter, at ordinary speed, he grounded, and jettisoned part of the cargo. There was no necessity on account of either sea or wind to make the harbor at once. No effort was made to get lighters. *Held:* The captain was guilty of negligence.

    1st—In attempting to enter the harbor until certain of his location.

    2d—In not advancing slowly, and with the utmost skill and caution.

    3d—In not attempting to save the cargo. *The Portsmouth*, 56.
17. The owner of the cargo has a right to insist that the captain shall not with his vessel take the chance of entering a harbor of which he is not certain, and without necessity. *Ib.*
18. Mariners must be held to the exercise of all reasonable skill and prudence. *Ib.*
19. After a vessel is stranded, the captain is bound to take all possible care of the cargo. *Ib.*
20. JETTISON.—Goods laden on deck with consent of the shipper under a bill of lading excepting "dangers of navigation," and necessarily jettisoned, do not make a case for general average. *The Milwaukee Belle*, 197.

ADMIRALTY—*Continued.*

21. The fact that the shipment on deck was sought by the master for the purpose of trimming his vessel held not to be material. *Ib.*
22. LIEN FOR REPAIRS.—Repairs upon a vessel in winter quarters in a foreign port, done by contract with the owner, there being no express claim at the time of a lien upon the vessel, and no immediate necessity for such repairs, do not constitute a maritime lien. *The Maitland*, 201.
23. The power of the owner and master in binding the vessel considered. *Ib.*
24. Various cases distinguished and commented upon. *Ib.*
25. DISTRIBUTION OF PROCEEDS.—The lien under a claim which could be enforced against a vessel by the state law follows the proceeds of a sale made to satisfy a maritime lien.
26. It is the duty of this court to distribute the proceeds to the parties entitled to them under the law, state or federal, and parties who might have perfected their liens under the state law, had not the issue come into the admiralty court, are entitled to priority out of the proceeds. *Proceeds of the Lady Franklin*, 121.
27. DISTRIBUTION OF PROCEEDS.—In the distribution of proceeds after the sale of a vessel under a decree of this court, parties having liens under state laws are entitled to payment in preference to the owner. *The Grace Greenwood*, 131.
28. MORTGAGE—RECORDING.—The meaning of the first section of the act of July 29, 1850, is that any mortgage upon a vessel, recorded as therein prescribed, shall take effect and be binding upon all parties. *Ib.*
29. Such a mortgage properly recorded becomes a binding security, and material-men claiming liens under state laws are bound to respect it. *Ib.*
30. PRIORITY.—The mortgage being prior in point of time should be first paid in full from the proceeds. *Ib.*
31. COLLISION.—A propeller ascending the Detroit river discovered the lights of an approaching barque and tug about two miles distant, the night being clear and starlight, but did not change her course until within half a mile of them, and then only enough to pass the tug at a distance of one hundred feet, when the barque suddenly sheered and struck the propeller amidships. *Held:* It was bad seamanship in the propeller to put only so short a distance between herself and the tug, and not slacken speed. *The Maria Martin*, 41.
32. Though the proximate cause of the collision was the improper handling of the barque, the propeller, having committed faults, cannot go free. *Ib.*
33. It is immaterial that the propeller had not a competent lookout, the captain and mate having seen the lights in good season, and needing no information which the lookout could give them. After they saw the lights the responsibility attached to them. *Ib.*

ADMIRALTY—*Continued.*

34. A vessel in tow is not excused from keeping close watch, and observing and obeying all signals. *Ib.*

35. PROPELLER ENTERING HARBOR.—A propeller, entering a harbor, having accepted the signal of an approaching tug and tow to keep to starboard, should, if for any reason it cannot do so, slacken speed. *The Alleghany*, 29.

36. It is not the duty of the tug to stop, as her tow would then become unmanageable. *Ib.*

37. SIX miles an hour is too high a rate of speed in Milwaukee harbor, when the vessel does not mind her helm. *Ib.*

38. Testimony of passengers commented upon. *Ib.*

39. SPEED OF TOW.—Seven or eight miles an hour is not a proper rate of speed for a steamboat having barges in tow, at a dangerous point on the Mississippi river. *The Milwaukee*, 509.

40. FOG WHISTLE.—Steamboats on the Mississippi river are in fault for neglecting the rule for the government of pilots, which requires steamboats running in a fog to sound the steam whistle at intervals not exceeding two minutes. *Ib.*

41. A tug is in fault which in a crowded thoroughfare, like the Chicago river, proceeds at the rate of over five miles an hour. *The Little Giant*, 23.

42. RULE OF CHICAGO RIVER.—It is the established rule of the Chicago river that a steamer must take the starboard side of the channel. *The Tug Brothers*, 104.

43. CROSSING AND SIGNALS.—If she wishes to go to port, she must give the proper signal to an approaching vessel, by the whistle; and the fact that a portion of the river is occupied by other vessels, does not make it less her duty to keep the proper side, or give the usual signal before crossing. *Ib.*

44. RATE OF SPEED.—A vessel in the river must run slowly and circumspectly, and though an approaching vessel is on the side of the channel to which she has no right, is nevertheless bound to reduce her speed to avoid a collision. *Ib.*

45. TUG AND TOW.—It is the duty of a vessel in tow of a tug to watch her own course, and also the tug; and if all her hands are making sail, and she cannot be properly managed, she is at fault. *Ib.*

46. Under such circumstances, the view of the helmsman being obstructed, a lookout should be kept. *Ib.*

47. In this case the tug, the tow, and the propeller, having each been in fault, the loss was divided among the three. *Ib.*

48. APPEAL BY ONE PARTY ONLY.—Where in a collision case the district court had found both parties in fault and divided the loss, and the respondents only appealed, the libellants are bound by the decree as to the fault on their part, and the circuit court on appeal cannot inquire as to that point. The only subject of inquiry is whether the respondents were in fault. *The Quickstep*, 291.

ADMIRALTY—*Continued.*

49. SIGNALS.—When on the Ohio river an ascending steamer has signaled to pass to starboard, and the descending steamer has accepted the signal, the first is bound to keep to starboard, and, if necessary, pass farther to the right than the original course. *Ib.*

50. CHANGE OF SIGNAL.—If the ascending steamer then changes her signal, and the other answers that she will keep her course, the ascending steamer having meanwhile changed her course, and a collision ensuing, is in fault. *Ib.*

51. NEGLIGENCE IN RUNNING BRIDGE.—A steamboat with loaded barges in tow, descending the Mississippi river about night-fall, the general bent of the weather being tempestuous, is in fault for running bridge piers; and the fact that the wrecking of a barge by collision with a pier was caused by a gust of wind does not relieve the liability. *The Mollie Mohler*, 505.

52. The carrier, in order to avail himself of the exceptions of "dangers of navigation," must show due diligence and proper care to avoid the accident, and that it was unavoidable. *Ib.*

53. The burden of proof for this purpose is upon the carrier. *Ib.*

54. LIABILITY OF TOW IN PASSING BRIDGE.—When a steamboat with three loaded barges in tow, having approached a bridge in fair weather too closely to back or stop, is driven against a pier by a sudden and unexpected gust of wind, the carrier is not liable for loss or injury to the cargo of one of the barges. *The Lady Pike*, 141.

55. The tow being in good order, and well manned, the passage of the bridge by similar tows being usual and safe, and no negligence being proved against the carrier, he can avail himself of this defense as within the exception in the bill of lading. *Ib.*

56. EXCEPTION OF DANGERS OF THE RIVER.—The exception in a bill of lading of unavoidable dangers of the river, relieves the carrier from liability for loss of the contents of a barge broken into by a sunken log or stump, concealed from view and not even marked by a ripple in the water, the steamboat and barge in tow pursuing the usual and proper course, no obstruction at that point being known to river pilots, and there being no proof of negligence or unskillfulness on the part of the master or crew, nor of any unseaworthiness of the steamboat or barge. *The Favorite*, 502.

57. DUTY OF CARRIER AS TO VESSEL.—A common carrier by water is bound to provide a safe and sea-worthy ship, in all respects fitted to carry her cargo through the ordinary perils of navigation, and the failure of so essential a portion of the mechanism as the rudder, in a gale of no extraordinary violence, is sufficient evidence that the vessel was unseaworthy in this regard. *Nine Hundred and Twenty-eight Barrels of Salt*, 319.

58. GENERAL AVERAGE.—The injury to the rudder being fairly chargeable to the common perils of the sea, the carrier is not protected by

ADMIRALTY—*Continued.*

the exceptions in his bill of lading, and cannot charge the consequences against the cargo. *Ib.*

59. Having reached a harbor of safety, and it being practicable for him to gain a neighboring harbor of repair, the expense of towing the ship to her destination, incurred by the master, cannot be charged *pro rata* against the cargo. *Ib.*

60. To compel the cargo to contribute to the towage, it must be shown that this was the only reasonable alternative left to the master, and the soundness of his judgment may be questioned by the owners of the cargo. *Ib.*

61. PROVISO IN STATUTE.—If an information sets forth a proper cause of forfeiture within the main part of a statute, the fact that it does not allege that the case is not within the proviso, under which there was an exemption from forfeiture, does not prevent the operation of the statute. *The Mary Merritt*, 381.

62. MATTER OF DEFENSE.—If the claimant relies upon the exemption under the proviso, he must allege it. That is matter of defense to be set up by him. *Ib.*

63. NATIONALITY OF VESSEL.—A barque built in Canada and owned in the United States is not a vessel of the United States; nor is it a foreign vessel of the character described in the first section of the act of March 1, 1817. *Ib.*

64. A SEAMAN on a lake vessel, having shipped under a verbal agreement without signing shipping articles, may leave the vessel at any time. *The City of Fremont*, 415.

65. If he draws the wages promised, not demanding more, he cannot recover a larger amount under the act of July 20, 1840. *Ib.*

66. Duty of master as to shipping articles stated. *Ib.*

67 REMOTE DAMAGES.—The libellant had left his tug and taken refuge in another at the time of a collision, and was injured in regaining his tug: *Held*, The collision was the remote, not the proximate cause of the injuries to libellant, and he cannot recover. *The Tug Union*, 18.

68. DISTRIBUTION OF SURPLUS.—The district court in admiralty has the right to exercise equity powers in the distribution of a surplus arising from a sale under decree to the parties entitled to such surplus, whether by federal or state law; and it is immaterial whether these parties have maritime liens. *The Skylark*, 251.

69. The reason is, because there is a fund in court which cannot be taken out except by its order, and parties having rights in the vessel can only exercise them by coming into this court. *Ib.*

70. PURCHASERS UNDER CONFLICTING PROCEEDINGS.—A purchaser under execution from a state court has no rights as against a decree in this court enforcing a maritime lien. *Ib.*

71. EXECUTION CREDITOR.—If he became the purchaser, the amount

ADMIRALTY—*Continued.*

which he bid must be applied on his debt, and the balance only can be proved as a claim in this court. *Ib.*

72. *It seems* that no claim would be valid as against a mortgage duly recorded under the act of July 29, 1850, except the lien by bottomry therein excepted. *Ib.*

73. *Also*, that a state legislature by declaring a claim to be a lien upon a vessel, cannot override a mortgage duly recorded according to the law of Congress. *Ib.*

ALTERATION.—*See* NOTES AND BILLS, 6, 7.

ASSIGNEE OF PATENT.—*See* PATENT, 22.

ATTACHMENT.—*See* BANKRUPTCY, 73.

AUTHORS, RIGHTS OF.—*See* COPYRIGHT.

BANKING.

1. BANK'S LIEN ON STOCK.—A transfer of stock in a banking corporation, organized under the act of June 3, 1864, to a *bona fide* holder is valid, though the seller, or pledgor, be at the time indebted to the bank, and a by-law of the bank declared that no transfer of the stock by any share-holder indebted to the bank should be made without the consent of the Board of Directors. *Evansville National Bank v. Metropolitan National Bank*, 527.

2. Such a by-law in effect attempts to create a lien upon stocks for debts of the holder, and the result is the same as if a loan were made upon the security of the stock—a transaction forbidden by the 35th section of the act.

3. The principle announced in the case of the *First National Bank of South Bend v. Lanier*, is decisive of this case.

BANKRUPTCY.

1. INSOLVENCY—WHAT CONSTITUTES.—A firm which for months has been unable to meet its liabilities as they mature, and was being pressed for payment, whose book-keeper had absconded, notifying its members of an error in their books to an amount equal to their general balance according to a recent statement, is insolvent within the meaning of the bankrupt act, and its members have no right to believe themselves solvent. *Campbell, Assignee, etc. v. Traders' National Bank*, 423.

2. GIVING WARRANT OF ATTORNEY IS PREFERENCE.—Although some unusual event might enable them to pay their debts, they could not expect to do so in the ordinary course of business; and if in such circumstances they execute a warrant of attorney to one of their creditors, they are giving a preference. *Ib.*

3. INTENTION PRESUMED.—Though they and the creditors say that it was not given for that purpose, yet such is its legal and necessary effect, and a man is presumed to intend the necessary consequences of his own acts. *Ib.*

BANKRUPTCY—*Continued.*

4. WHEN PREFERENCE SET ASIDE.—Though the creditor be guilty of no fraud in fact, yet if, suspecting the solvency of his debtor, he obtains property or money, and thereby a preference, and his debtor proves to be insolvent, he may be said to have had reasonable ground to believe that his debtor was insolvent, and cannot avail himself of a judgment or security so obtained; the fact that the warrant of attorney was executed under threats of legal process and arrest, and in fear of disgrace, does not shield the debtors; the act is, nevertheless, voluntary. *Ib.*
5. "SUFFERING" DEFINED.—There is a proper distinction between the words "suffer" and "procure," as used in the act; and it is these very things which a debtor under pressure and powerful motives brought to bear upon him "suffers," which the act intends to prevent. *Ib.*
6. *It seems* that where a man acts without knowledge of the condition of his debtor, or of anything to create suspicion of his solvency, and in good faith obtains a payment or security, the bankrupt law will not interfere with it. *Ib.*
7. NOTICE OF INSOLVENCY—WHAT CONSTITUTES.—The simple fact that a man doing a large business obtains renewals of his commercial paper or pays under special circumstances a large discount, is not notice of insolvency to a creditor, it being shown that at that time similar commercial paper was selling at equal rates in the market. *Golson v. Nichoff*, 434.
8. PREFERENCE.—Upon a judgment note is obtained when the judgment is entered, not when the warrant of attorney is given. *Ib.*
9. JUDGMENT BY CONFESSION—WHEN A PREFERENCE.—If at the time of the entry of judgment the creditor had knowledge of his debtor's insolvency, or of such facts as to make it reasonable to believe him insolvent, the collection of a debt or entry of judgment and issue of execution is a preference under the act. *Ib.*
10. The fact that the note and warrant of attorney were given for a *bona fide* debt, and that the creditor at that time had no knowledge of the debtor's insolvency, does not sustain such subsequent judgment. *Ib.*
11. Circumstances stated which are sufficient notice to a creditor of his debtor's insolvency. *Ib.*
12. NOTICE OF INSOLVENCY.—When a merchant stops payment on his commercial paper, and the holder commences suit thereon, to which there is no defense, he has reasonable cause to believe the debtor is insolvent. *Dunning Assignee, etc. v. Perkins*, 421.
13. PREFERENCE.—If afterwards, knowing that the debtor is obliged to ask extensions, he, within the time designated in the act, takes security and dismisses the suit, then the securities can be recovered by the assignee in bankruptcy. *Ib.*

BANKRUPTCY—*Continued.*

14. PLEDGE.—A man not knowing himself to be insolvent may pledge his property to another whose money he has unlawfully used, and such a transaction is not a preference void under the bankrupt act. *Jenkins Assignee v. Mayer*, 303.
15. Such a pledge is equally valid if made by an agent, and his authority need not be in writing. *Ib.*
16. Money paid to redeem property thus pledged cannot be recovered by the assignee. *Ib.*
17. Clerks and agents are not supposed to have such entire control over the resources of their principal as to make their failure to meet an obligation of their principal an act of bankruptcy against him. *Ib.*
18. SUSPENSION OF COMMERCIAL PAPER.—In the 39th section of the bankrupt law, "has fraudulently stopped or suspended and not resumed payment of his commercial paper within a period of fourteen days," the word "fraudulently," should be construed as limiting "stopped" only, and the words "fourteen days," as applying only to the *suspension, etc. In re Thompson & McClallen*, 166.
19. When the stoppage is fraudulent it is not necessary that it be continued, and a suspension of payment for fourteen days, though without any element of fraud, constitutes an act of bankruptcy. *Ib.*
20. A refusal on the ground of a legal defense, is not a stoppage or suspension within the meaning of the law, *Ib.*
21. SUSPENSION OF COMMERCIAL PAPER.—The failure of a banker, merchant, or trader, who has suspended payment of his commercial paper, to resume within fourteen days, is *prima facie* evidence of fraud. *In re Shea and Boyle*, 156.
22. Unless such inference is affirmatively rebutted, he will, on a proper creditor's petition, be adjudged a bankrupt. *Ib.*
23. FRAUDULENT CONVEYANCE BY BANKRUPT.—An assignee in bankruptcy can maintain an action to recover property conveyed by the bankrupt with intent to defraud his creditors previous to the filing of the petition; in such case he represents the rights of the creditors. *Bradshaw v. Klein*, 20.
24. Such action is not limited by the provisions of the 35th section, but only by the general statute of limitations. *Ib.*
25. PETITION BY SINGLE CREDITOR.—The district court will not take jurisdiction in bankruptcy on the petition of an only creditor, whose debt is secured on real estate. *In re Johann*, 139.
26. Such creditor seeking to set aside a fraudulent conveyance must follow his remedy by bill in the state court. *Ib.*
27. A conveyance, even though fraudulent, is not made "in contemplation of bankruptcy or insolvency," there being no other creditors, and this debt being secured. *Ib.*
28. There is nothing to bring such a case within the scope or intent of the act. *Ib.*

BANKRUPTCY—*Continued.*

29. The 44th section of the bankrupt act construed. *United States v. Frank*, 263.

30. A man who, while carrying on a retail trade, buys large quantities of goods, and ships them under the pretense of needing them in his regular business, but ships them off and sells them at wholesale at a sacrifice, is guilty under the act. *Ib.*

31. PARTICULARITY IN INDICTMENT.—In an indictment under section 44 of the Bankrupt Act, for obtaining goods on credit with intent to defraud, the proceedings in the bankrupt court must be pleaded and proved with such particularity as to show affirmatively that an adjudication of bankruptcy was made upon a case in which the court had jurisdiction. *United States v. Prescott*, 325.

32. ITS REQUISITES.—The indictment, therefore, should set out the filing of the petition, the name of the petitioning creditor, the amount of his debt, the alleged act of bankruptcy, and the adjudication of the bankrupt court. *Ib.*

33. The description of the goods obtained, as "a large quantity of boots and shoes," is too uncertain. It should be as definite as would be required in a declaration in trover. *Ib.*

34. Offenses under section 44 are misdemeanors, and the word 'feloniously" should not be used. *Ib.*

35. Dates should not be specified by figures in an indictment. *Ib.*

36. LIEN OF EXECUTION.—An execution in the hands of the sheriff being by the laws of the state of Illinois a lien upon all the personal property of the defendant within the county, for the space of ninety days, if a petition in bankruptcy is filed during that time, the lien is transferred to the property in the hands of the assignee, and the execution must be paid in full out of the proceeds. *In re Weeks*, 259.

37. JUDGMENT BY CONFESSION.—The fact that the judgment was entered upon a warrant of attorney does not invalidate the lien if the creditor did not know of the failing circumstances of the debtor, and if it was not entered up "in contemplation of bankruptcy or insolvency." *Ib.*

38. A direction by the execution creditor to the sheriff "to hold the execution, but not to levy for a few days, or until further orders," does not impair the lien. *Ib.*

39. JUDGMENT BY CONFESSION.—Where a creditor has reasonable cause to believe his debtor insolvent, he acquires no preference in bankruptcy over other creditors by taking from his debtor a promissory note with warrant of attorney to confess judgment, and levying an an execution on said judgment note, on the debtor's stock of goods. *In re Terry*, 356.

40 PREFERENCE—LIEN.—Although the warrant of attorney may have been given more than four or six months before the institution of proceedings in bankruptcy, yet if the lien of the execution only

BANKRUPTCY—*Continued.*

became operative within the six months, the creditor is entitled to no preference, and the limitations on the 35th and 39th sections do not apply. *Ib.*

41. PREFERENCE.—A judgment by default, and execution upon a note given when the creditor had cause to believe the debtor insolvent, are preferences under the act, and do not give a valid lien upon the property of the debtor, or its proceeds. *In re McGie*, 163.

42. The debtor *suffers* his property to be taken under legal process, by not defending; he should file his petition in bankruptcy. *Ib.*

43. The court will not order such a judgment to be satisfied from funds in the hands of the assignee. *Ib.*

44. RELINQUISHING PREFERENCE.—A creditor accepting a chattel mortgage, with reasonable cause to believe his debtor insolvent, and such act being declared an act of bankruptcy, cannot, by relinquishing his mortgage, become entitled to prove his debt. *In re Princeton*, 116.

45. MORTGAGE ON AFTER-ACQUIRED PROPERTY.—A mortgage of personal property being, under the laws of Wisconsin, ineffectual to pass after-acquired property, the assignee in bankruptcy is entitled to such property as against the mortgage. *In re Eldridge*, 362.

46. Though a mortgage be valid as to property then in possession, the authority in a mortgage subsequently given to cover the property afterward acquired, does not enable the mortgagee, by taking posession of such property, to hold it as against the assignee. This would be in effect a preference, and against the spirit of the act. *Ib.*

47. A mortgagee in possession, being entiled to retain all property upon which his mortgage was valid, on a sale of such property by order of the district court, he should only be charged with the reasonable expenses of the sale of such property, and not with any portion of the costs in bankruptcy. *Ib.*

48. A chattel mortgage "of all the goods and merchandise" in a store, here held not to include fixtures. *Ib.*

49. CHATTEL MORTGAGE—WHEN INVALID.—A chattel mortgage, not valid as against creditors, under the state law, and under which the mortgagee had taken possession, having at the time reasonable cause to believe his debtor insolvent, is invalid as against the assignee in bankruptcy. *Harvey, assignee, etc., v. Crane*, 496.

50. IF INFORMAL, NOT CURED BY SUBSEQUENT POSSESSION.—Though the mortgage be good as between the parties, and given to secure a *bona fide* debt, yet not having been acknowledged and recorded as required by statute, the mortgagee, having retained it until the insolvency of the debtor, cannot, by then taking possession, be remitted to his rights as of the date of the mortgage. *Ib.*

51. WHEN VOID AS A PREFERENCE.—Though possession was taken before commencement of proceedings in bankruptcy, and was in accordance with the provisions of the mortgage, yet, being within

BANKRUPTCY—*Continued.*

the time limited by the bankrupt act, it operated as a preference, void as against creditors, and equally void as against the assignee. *Ib.*

52. IF IRREGULAR, NOT CURED BY RECORD.—In Illinois, recording a chattel mortgage, in which material changes had been made since its acknowledgement, gives it no additional validity. *Ib.*

53. MORTGAGE ON PARTNERSHIP PROPERTY TO SECURE INDIVIDUAL DEBT.—A mortgage given by partners upon partnership property to secure an individual debt of one of the partners is valid. The rule preferring partnership property to the payment of partnership debts is for the benefit of the partners, and they may waive it. Such a mortgage is a waiver. *In re Kahley*, 383.

54. MORTGAGE ON RETAIL STOCK.—A mortgage upon a stock of goods, authorizing the mortgagor to sell and replace them in such a manner as he may determine, and use the proceeds as he sees fit, is void as to such goods as the power of sale relates to. *Ib.*

55. POWER TO SELL—HOW PROVED—AVOIDS MORTGAGE.—If such power of sale is inserted in the mortgage, it is proved by the production of the mortgage, and the mortgage would be held void by the court. If not, it may be proved by parol, or inferred from circumstances and the conduct of the parties, and then it would become the duty of the court to instruct the jury that such power of sale by consent or understanding avoids the mortgage. *Ib.*

56. CREDITORS MAY ELECT.—The creditors have their election to ratify the sale and collect any balance due, or avoid it, and take the goods. *Ib.*

57. VOID SALE TO CREDITOR.—The sale of a stock of goods with the fixtures to a creditor, he giving his notes for the balance above his claim, and being aware that their debts greatly exceeded their assets, is not made in the usual and ordinary course of business, and is void under the 35th section of the bankrupt act. *Ib.*

58. RESTORED TO RIGHTS AS MORTGAGEE.—The title of the purchaser thus failing under the proceedings in bankruptcy, his purchase does not impair his rights as mortgagee, but he should be restored to his rights as such, as they existed at the time of his purchase. *Ib.*

59. MORTGAGE ON STOCK, ETC.—HOW FAR VALID.—A mortgage covering fixtures, a stock of goods on hand kept for sale, and all such as should afterwards be purchased and put into the store, may be valid as to the fixtures, but void as to the goods. *Ib.*

60. COURT MAY ORDER SALE FREE FROM LIEN.—By virtue of sections 1 and 20 of the bankrupt act the court has the right to take possession of and sell mortgaged property, free from the lien without first satisfying it, but in such case the lien is transferred to the funds in court. *Ib.*

61. This is a matter of discretion; and if the mortgaged property is of less value than the debt, or if of no marketable value, and there is

BANKRUPTCY—*Continued.*

no question as to the validity of the lien, it should be delivered to the creditor. *Ib.*

62. ASSIGNEE CANNOT AVOID USURIOUS MORTGAGE.—The assignee in bankruptcy of one of two joint makers of a note and mortgage, cannot maintain a petition to declare the securities void for usury. *Bromley, assignee, etc., v. Smith*, 511.

63. PRIVILEGE FOR BORROWER ALONE.—The assignee is not a borrower within the meaning of the statute of Wisconsin concerning usury, and the power to institute proceedings to obtain a forfeiture is a privilege conferred by the act upon the borrower. The assignee, to obtain relief, must tender the money actually borrowed. *Ib.*

64. There is not in the bankrupt act any grant of a power or right to institute proceedings by petitition for the recovery of a statutory forfeiture not claimed by the bankrupt either before or after the proceedings in bankruptcy. *Ib.*

65. The assignee may require the creditor to prove his debt, reciting the security, and setting forth the consideration, and contest the claim for any usurious surplus. *Ib.*

66. MORTGAGOR NOT COMPETENT WITNESS AGAINST EXECUTORS.—Although neither of the mortgagors united in the petition, nor were parties to the record, yet under the act of Congress of March 3, 1865, they are not competent witnesses against the executors of the opposite party, as to transactions with or statements made by the testator. *Ib.*

67. DISTRESS WARRANT IS MESNE PROCESS.—Under the statute of Illinois the levy of a distress warrant is in the nature of an attachment under *mesne* process, and is within the 14th section of the bankrupt act. *In re Joslyn*, 235.

68. CERTIFICATE IS FINAL PROCESS.—The certificate granted by the court is in the nature of a *final* process, and if issued before the commencement of proceedings in bankruptcy, gives the landlord a perfected lien and priority over general creditors. *Ib.*

69. LEVY OF WARRANT GIVES NO PRIORITY.—Even though the landlord has levied his distress warrant, neither the common law nor the statute gives him a priority, if the petition in bankruptcy has been filed before certification by the court of the amount of rent due; but he must prove his claim with the general creditors. *Ib.*

70. PREMIUM NOTE.—The bankruptcy of an insurance company is no defense to an action upon a note given for a premium. *Cary, assignee, etc., v. Nagel*, 244.

71. EXEMPT PROPERTY.—It is the duty of this court to see that the property to which a bankrupt is entitled is secured to him, as much as to see that he surrenders the balance to his creditors. *In re Stevens*, 378.

72. LEX DOMICILII.—Property exempt by the laws of the state where

BANKRUPTCY—*Continued.*

the bankrupt resides, and where the petition is filed, will be protected, wherever it may be actually situated. *Ib.*

73. LEX REI SITÆ.—At the time of the filing of the petition in Wisconsin, certain property was in the possession of an officer of the State of Illinois, (where by law it was not exempt,) by virtue of a writ of attachment. *Held:*

1st. This court will not consider the laws of Illinois to see whether under them the property is exempt; the rights of the bankrupt and his creditors are to be determined under the bankrupt act alone. *Ib.*

2d. ATTACHMENTS—Are dissolved without reference to the property upon which they are levied, the object of the act being to stop all proceedings against the bankrupt in any other court, and bring all matters and questions between the bankrupt and his creditors into the bankrupt court for final settlement. *Ib.*

3d. The question whether the property is exempt under the Illinois law is not material. *Ib.*

74. LIEN OF OFFICER FOR FEES.—Officer in possession of the property under the attachment writ cannot retain the property until his fees are paid. The attachment being dissolved, he has no means of enforcing his claim against the property. His only remedy is by application to the court to be paid out of funds in the hands of the assignee. *Ib.*

75. EXEMPT PROPERTY.—An assignee cannot recover property excepted by the 14th section of the bankrupt law. *Schlitz, assignee, etc., v. Schatz*, 248.

76. Such property the debtor may lawfully mortgage or convey, and such a preference is not in violation of the act, nor a fraud on it. *Ib.*

77. The fact that soon after the conveyance, and before the petition was was filed against him, the debtor left the country, does not place the assignee in a better position. *Ib.*

78. EXEMPTIONS.—A family sewing machine is properly exempt under the 14th section of the bankrupt act. *In re Graham*, 449.

79. A watch, not being exempt by the statute of the state, does not properly come within the discretionary articles contemplated by that section. *Ib.*

80. NONE IN PROPERTY FRAUDULENTLY CONVEYED.—In property conveyed by the bankrupt in fraud of creditors prior to the filing of the petition against him, and afterwards recovered to the estate, he cannot claim any exemptions. The sale is good as against him. In attempting to place his property beyond the reach of his creditors, he has placed his exemptions beyond his own reach. *Ib.*

81. In the list of exemptions the value of the articles set apart should be stated, so that it may be seen whether they come within the limitations of the act. *Ib.*

BANKRUPTCY—*Continued.*

82. FIFTY PER CENT. CLAUSE—REFERS TO FAIR CASH VALUE OF ASSETS. Is not operative against a bankrupt, if the fair cash value of the assets turned over to the assignee is equal to 50 per cent. of the claims proved, on which he was liable as principal debtor. *In re Thompson*, 481.

83. NOT CONTINGENT UPON AMOUNT OF DIVIDEND.—The change made by the amendment of July 27th, 1868, clearly indicates that the discharge is not contingent upon the amount of dividend actually received by creditors. *Ib.*

84. *It seems*—that if the bankrupt schedules the goods at an exaggerated value, a creditor may resist the application, and introduce proof of the actual value of the goods turned over. *Ib.*

85. PARTNERSHIP AND INDIVIDUAL DEBTS—DISTRIBUTION.—The English rule in bankruptcy that where there are both partnership and individual debts, but no partnership assets and no solvent partner, the debts of the firm and of the members can be proved, and the estate is to be distributed *pari passu* among the creditors, approved and adopted. *In re Knight*, 518.

86. This rule applies even though the total assets consist of property sold by the individual creditors to the bankrupt. *Ib.*

87. Various Massachusetts cases examined and disapproved. *Ib.*

88. The federal courts, in construing the bankrupt law, are not bound by the decisions of a state court on a similar insolvent law. *Ib.*

89. HOLDER OF FIRM NOTE INDORSED BY INDIVIDUAL PARTNER MAY PROVE AGAINST BOTH ESTATES.—A bank having discounted a note made by a firm to one of the partners, and indorsed by him, is entitled to prove the debt against the estate of the firm and of the individual partner. *In re Bradley*, 515.

90. The form of the contract or obligation of the maker and indorser should not prejudice the legal rights of a creditor claiming distribution of assets in bankruptcy. *Ib.*

91. DISCHARGE OF INVOLUNTARY BANKRUPT.—An involuntary bankrupt may be discharged unless some act specified in the 29th section is proved against him. *In re Clark*, 73.

92. His estate having been administered upon, and the object of the law having been fulfilled, if he has acted in good faith there is no reason why he should be compelled to go through the vain ceremony of filing a voluntary petition. *Ib.*

93. DISCHARGE AFTER DEATH.—The 12th section of the bankrupt act does not authorize the granting of a discharge where the bankrupt, dying during the proceedings, has not taken the final oath prescribed by the 29th section. *In re Quinike*, 354.

94. JUDGMENT FOR TORT—is discharged under the bankrupt law. *In re Wiygers*, 71.

95. RELEASE FROM ARREST.—A bankrupt arrested under a *ca. sa.*

BANKRUPTCY—*Continued.*

issued upon such a judgment will be released by this court, even though the state court had refused so to do. *Ib.*

96. JURISDICTION EXCLUSIVE. — The jurisdiction of the district court is exclusive, and its authority paramount, and it will protect the bankrupt in the manner contemplated by the law. *Ib.*

97. As to arrest, there is no distinction between *mesne* and final process. *Ib.*

98. DISCHARGE AFTER A YEAR. — A discharge may be granted to a bankrupt on an application made more than a year after the adjudication. *In re Canady*, 75.

99. The true construction of the 29th section gives the court a discretionary power, and, in a proper case, on explanation of the delay, a discharge will be granted. *Ib.*

101. A REVISORY PETITION — to the circuit court, under the second section of the bankrupt act must show wherein the error in the order or ruling of the district court complained of consists, and its nature must be distinctly set forth. The case will not be taken up *de novo*. *In re Sutherland*, 405.

101. Proper practice stated. *Ib.*

BILL OF LADING.—*See* ADMIRALTY, 20, 52, 53, 56.

BILLS.—*See* NOTES AND BILLS.

BOARD OF SUPERVISORS.—*See* MUNICIPAL BONDS.

BOATS AND VESSELS.—*See* ADMIRALTY.

BONA FIDE PURCHASER.—*See* CHANCERY, 15.

A mortgagee of real estate is a *bona fide* purchaser, even though the mortgage was given to secure a pre-existing debt. *Partridge v. Smith*, 183.

BURDEN OF PROOF.—*See* EVIDENCE, 3, 4.

BY-LAW.—*See* BANKING.

CHANCERY.—*See* PATENTS, 4, 7, 10.

1. INJUNCTION NOT ALWAYS GRANTED ON VALID PATENT.—A court of equity, while it may be satisfied the patent is valid, does not feel inclined, where those claiming under the patent have been negligent in enforcing their rights, to interfere in all cases, by an absolute peremptory injunction. *Goodyear v. Honsinger*, 1.

2. INJUNCTION AGAINST INFRINGEMENT — WHEN GRANTED. — If the rights under a patent are clear, and the infringement by the defendant free from doubt, and particularly after use of the invention by the patentee for a considerable time without controversy, the modern practice is not to compel the plaintiff in the first instance to proceed at law. *Shelly v. Brannan*, 315.

3. Under such circumstances it is the general practice to apply to the equitable side of the court for relief, which, in a proper case, is given without hesitation. *Ib.*

CHANCERY—*Continued.*

4. BOND.—The patent never having been the subject of litigation, the complainant was ordered to file an injunction bond before the issue of the writ. *Ib.*
5. TAX-PAYERS MAY ENJOIN SUPERVISORS.—Proceedings preparatory to issuing county bonds must as substantially comply with the law, as in levying a tax for the payment of the debt, although in suits brought on such bonds by innocent holders, the court rejects proof of errors in or about the election, or in issuing the bonds. Objections made by tax-payers before the bonds are issued, are in time, and in a proper case, an injunction may be granted. *Goedgen v. Supervisors of Manitowoc County*, 328.
6. RESTRAINING GOVERNMENT OFFICERS.—Although it might be the duty of a court to interfere with the execution of a law imposing unreasonable conditions to the pursuit of a lawful business, yet it will not restrain the officers of the government from carrying out a law, on the application of a party who simply fears that he may be injured in a business which he proposes to undertake. He must first be pursuing his lawful business, and some unauthorized act be done or threatened. *Mason v. Rollins*, 99.
7. LIMITATION—LACHES.—A bill in equity cannot be maintained upon a bond for the conveyance of real estate executed and delivered more than twenty years previously, the obligor having soon afterwards repudiated its obligation and thenceforth treated the land as his own, and the complainant having in the meantime made no effort to enforce his rights. *Wright v. Fullerton*, 386.
8. The fact that he considered the bond worthless, did not suppose that he could collect anything from the defendant, and was not aware that he had any rights under it until advised by counsel, do not form a sufficient excuse for his laches. *Ib.*
9. *Seymour v. Freer*, 8 Wallace, 202, distinguished: in that case both parties continued their relations under the contract, whereas, in this case one of them denied the claim of the other. *Ib.*
10. FORECLOSURE AGAINST RAILROAD COMPANY. — Where a bill had been filed in this court to foreclose a mortgage given by a railroad company, various interlocutory orders entered, a trustee appointed who had taken possession of the road, and on the faith of these orders, certain bonds had been surrendered, stocks taken, and debts and liabilities incurred, this is the proper tribunal to decide the rights and equities of the parties in interest. *Bill v. New Albany, etc., R. R. Co.*, 390.
11. TRUSTEE SHOULD REPORT TO THIS COURT — and any of the parties have the right to insist upon such report. He has no right to turn over to another jurisdiction matters which had been partially adjudicated here, and this is the only court whose decision upon the rights involved here is binding on the parties. *Ib.*
12. When a party in interest in such case asks for relief, it is no answer

CHANCERY—*Continued.*

to say that another jurisdiction has attempted to seize the property, and thus place it beyond the power of this court to give relief. *Ib.*

13. INTERFERENCE BY STATE COURT. — Where during the pendency of the suit in this court, the trustee, acting with certain bondholders, but without notice to or permission from this court, filed a bill in the state court to foreclose the same mortgages which are the subject of this bill, and making no reference to the case in this court, upon which a receiver was appointed, foreclosure ordered, and sale made by the sheriff, who, under order of the court, delivered the road to the purchasers; such an interference on the part of the state court with property at the time within the jurisdiction of this court, was unauthorized, and it is nevertheless within the control of this court, to adjudicate upon the equitable rights of all who have ever been before it. *Ib.*
14. A bondholder and stockholder is entitled, in such a case, to the equitable interposition of this court to protect his rights under its decrees, and to demand an account from the trustee or his representatives. *Ib.*
15. The purchasers and their counsel having had notice of what had occurred in this court, cannot claim to be *bona fide* purchasers. *Ib.*
16. RECEIVER — WHEN APPOINTED.—The company being insolvent, the original trustee having died without rendering a proper account to this court, and the road being in the actual possession of parties acting in hostility to its decrees, a receiver should be appointed. *Ib.*
17. REFORMATION OF INSURANCE POLICY.—A court of equity has power to reform and cancel an insurance policy issued by mistake for a greater length of time than was intended by the parties. *North American Insurance Co. v. Whipple*, 418.
18. Circumstances stated under which a policy will be canceled even after a loss has occurred. *Ib.*

CHATTEL MORTGAGE.

1. MORTGAGE ON AFTER-ACQUIRED PROPERTY.—A mortgage of personal property being, under the laws of Wisconsin, ineffectual to pass after-acquired property, the assignee in bankruptcy is entitled to such property as against the mortgagee. *In re Eldridge*, 362.
2. Though a mortgage be valid as to property then in possession, the authority in a mortgage subsequently given to cover the property afterward acquired, does not enable the mortgagee, by taking possession of such property, to hold it as against the assignee. This would be, in effect, a preference, and against the spirit of the act. *Ib.*
3. A mortgagee in possession being entitled to retain all property upon which his mortgage was valid, on a sale of such property by order of the district court, he should only be charged with the reasonable expenses of the sale of such property, and not with any portion of the costs in bankruptcy. *Ib.*

CHATTEL MORTGAGE—*Continued.*

4. A chattel mortgage "of all the goods and merchandise" in a store, here held not to include fixtures. *Ib.*
5. WHEN INVALID.—A chattel mortgage, not valid as against creditors, under the state law, and under which the mortgagee had taken possession, having at the time reasonable cause to believe his debtor insolvent, is invalid as against the assignee in bankruptcy. *Harvey, Assignee etc. v. Crane*, 496.

   IF INFORMAL, NOT CURED BY SUBSEQUENT POSSESSION.—Though the mortgage be good as between the parties, and given to secure a *bona fide* debt, yet not having been acknowledged and recorded as required by statute, the mortgagee, having retained it until the insolvency of the debtor, cannot, by then taking possession, be remitted to his rights as of the date of the mortgage. *Ib.*
7. WHEN VOID AS A PREFERENCE.—Though possession was taken before commencement of proceedings in bankruptcy, and was in accordance with the provisions of the mortgage, yet, being within the time limited by the bankrupt act, it operated as a preference, void as against creditors, and equally void as against the assignee. *Ib.*
8. IF IRREGULAR, NOT CURED BY RECORD.—In Illinois, recording a chattel mortgage in which material changes had been made since its acknowledgement gives it no additional validity. *Ib*

CITIZENSHIP.—*See* COPYRIGHT; JURISDICTION, 2–6.

COLLISION.

1. VESSEL HAVING LOST HER SIGNAL LIGHTS—In a storm, and proceeding on her way with the prohibited white light, is not necessarily to be charged with all the damages in case of collision. *The Gray Eagle*, 25.
2. DUTY OF OTHER VESSELS.—The fact that she carried a light prohibited to vessels while sailing does not of itself absolve other vessels from the observance of that degree of caution, care, and nautical skill which the exigencies of the case require. *Ib.*
3. Though a white light usually represents a vessel at anchor, the officers of an approaching vessel have no right to conclude that it always does. *Ib.*
4. MUST WATCH LIGHTS.—It was their duty, from the moment the light was seen, to watch it carefully in order to ascertain from its bearings whether the vessel was in motion; and if, in the exercise of ordinary nautical skill and care this could have been done, and was omitted, and this omission contributed to the accident, then their vessel must share the loss, although the other vessel was in fault in running with a prohibited light. *Ib.*
5. A vessel is not under all circumstances required to come to anchor at night when through misfortune she has lost her signal lights. In

COLLISION—*Continued.*

running, she is so far protected that every other vessel must be navigated with reasonable care, skill, and caution. *Ib.*

LIGHTS OF SAILING VESSEL.—A green and red light placed in the center of a schooner, forward, and separated only by a board, do not fulfill the requirements of the act of congress of April 29, 1864. The lights must be placed at the sides of the vessel. *The Empire State*, 216.

7. LOOKOUT.—When at the time of a collision with a propeller the mate was near the wheelsman, and they were the only persons on deck, there was, properly speaking, no lookout, and the schooner was in fault. *Ib.*
8. But when they had seen the propeller, and recognized her as such, it being their duty to keep their course, it cannot be said that this want of a lookout in any degree contributed to the collision. *Ib.*
9. DUTY OF APPROACHING VESSEL.—Those on board the propeller having seen the schooner, but being uncertain as to her course, and not having clearly distinguished her lights until just before the collision, it cannot be said that they had all the information in regard to the course of the schooner which the proper lights would have furnished, and that their absence did not contribute to the collision. *Ib.*
10. The propeller, however, was bound to exercise the greatest care and vigilance, and, if necessary, check her speed; and also to watch the schooner with constant vigilance; if, by doing this, she could have avoided the collision, she is guilty of contributory negligence. *Ib.*
11. PROPELLER ENTERING HARBOR.—A propeller, entering a harbor, having accepted the signal of an approaching tug and tow to keep to starboard, should, if for any reason it cannot do so, slacken speed. *The Alleghany*, 29.
12. It is not the duty of the tug to stop, as her tow would then become unmanageable. *Ib.*
13. Six miles an hour is too high a rate of speed in Milwaukee harbor, when the vessel does not mind her helm. *Ib.*
14. Testimony of passengers commented upon. *Ib.*
15. A propeller ascending the Detroit river discovered the lights of an approaching barque and tug about two miles distant, the night being clear and starlight, but did not change her course until within half a mile of them, and then only enough to pass the tug at a distance of one hundred feet, when the barque suddenly sheered and struck the propeller amidships. *Held:* It was bad seamanship in the propeller to put only so short a distance between herself and the tug, and not slacken speed. *The Maria Martin*, 41.
16. Though the proximate cause of the collision was the improper handling of the barque, the propeller, having committed faults, cannot go free. *Ib.*
17. It is immaterial that the propeller had not a competent lookout, the captain and mates having seen the lights in good season, and need-

COLLISION—*Continued.*

ing no information which the lookout could give them. After they saw the lights the responsibility attached to them. *Ib.*

18. A vessel in tow is not excused from keeping close watch, and observing and obeying all signals. *Ib.*

COMMISSION MERCHANT.—*See* PRINCIPAL AND AGENT.

COMMON CARRIER.—*See* ADMIRALTY, 51–60.

1. DUTY OF CARRIER AS TO VESSEL.—A common carrier by water is bound to provide a safe and seaworthy ship, in all respects fitted to carry her cargo through the ordinary perils of navigation, and the failure of so essential a portion of mechanism as the rudder, in a gale of no extraordinary violence, is sufficient evidence that the vessel was unseaworthy in this regard. *Nine Hundred and Twenty-eight Barrels of Salt*, 319.

CONDEMNATION.—*See* DEDICATION.

CONFLICT OF JURISDICTION.—*See* CONSTITUTIONAL LAW — CHANCERY, 10–15.

1. To a writ of *mandamus* issuing from this court it is not a sufficient answer that the respondents had been enjoined by a state court from doing the act which the writ of *mandamus* commanded. *United States, ex rel. v. Supervisors of Lee county*, 77.
2. FEDERAL COURTS SUPREME, when, acting within their sphere, and wherever they come in conflict with the state courts, the latter must give way. *Ib.*
3. EFFECT OF REVERSAL OF DECISION ON VALIDITY OF COUNTY BONDS.—Where county bonds had been sold upon the faith of decisions of the supreme court of the state declaring their validity, the fact that the court afterwards reversed its decision does not invalidate those previously purchased in good faith and before maturity. *Ib.*
4. State courts have not the right to interfere with the process of this court to collect judgments therein rendered on such bonds. *Ib.*
5. Where the United States circuit court, and the supreme court of the state have ruled differently upon the same questions, and the Supreme Court of the United States has sustained the circuit court, neither the state courts of that state, nor litigating parties, can disregard the mandate of the circuit court. *Ib.*
6. REMEDY BY MANDAMUS.—A writ of *mandamus* is the proper process against a board of supervisors to compel the levy of a tax and payment of a judgment obtained against the county, in this court. *Ib.*
7. Where the respondents make no return to the writ, or refuse to obey it, this court will issue an attachment. *Ib.*
8. JURISDICTION ON REMOVAL.—Where a suit in the United States circuit court has been removed to the circuit court in another circuit, the latter court has the same power over the parties which the first court would have otherwise had. *Ib.*
9. JURISDICTION EXCLUSIVE.—The jurisdiction of the district court in

CONFLICT OF JURISDICTION—*Continued.*

bankruptcy is exclusive, and its authority paramount, and it will protect the bankrupt in the manner contemplated by the law. *In re Wiggers*, 71.

10. PURCHASERS UNDER CONFLICTING PROCEEDINGS.—A purchaser under execution from a state court has no rights as against a decree in this court enforcing a maritime lien. *The Skylark*, 251.
11. EXECUTION CREDITOR.—If he became the purchaser, the amount which he bid must be applied on his debt, and the balance only can be proved as a claim in this court. *Ib.*
12. *It seems* that no claim would be valid as against a mortgage duly recorded under the act of July 29, 1850, except the lien by bottomry therein excepted. *Ib.*
13. *Also*, that a state legislature, by declaring a claim to be a lien upon a vessel, cannot override a mortgage duly recorded according to the law of Congress. *Ib.*

CONSEQUENTIAL DAMAGES.—*See* REMOTE DAMAGES.

CONSTITUTIONAL LAW.—*See* CONFLICT OF JURISDICTION—REVENUE LAWS, 1.

1. PATENT RIGHTS—CONSTITUTIONALITY OF STATE LAW.—The legislature of a state has no right to interfere with the enjoyment of property in inventions, or to annex conditions to the grant. *Ex parte Robinson*, 309.
2. If a patentee complies with the laws of congress on the subject, he has a right to go into the market anywhere within the United States and sell his property. *Ib.*
3. A state law regulating the sale of patent rights is void. *Ib.*

CONTRIBUTION.—*See* ADMIRALTY, 59–60.

CONVEYANCE.—*See* REAL ESTATE.

COPYRIGHT.

1. ACTION BEFORE PUBLICATION.—The right of action at law, as well as in equity, conferred by the copyright law of February 3, 1831, may accrue before actual publication of the work. *Boucicault v. Wood*, 34.
2. The proper filing of the title of a work brings the author within the law, and the 5th section does not deprive him of his action for injury previous to publication. *Ib.*
3. The same rule applies to the supplemental act of August 18th, 1856; and the author or proprietor of a dramatic work may maintain an action for infringement of his copyright committed after the filing of the title, but before publication. *Ib.*
4. FOREIGNER—RESIDENCE—INTENTION.—In order to entitle an alien to the benefit of these laws, he must prove himself a resident of the United States. Residence, within the meaning of the statute, is to be determined by his intention, accompanied by his acts—not simply by lapse of time. The fact that he left the country after filing the title does not necessarily deprive him of his rights; the change of

COPYRIGHT—*Continued.*
intent does not avoid the copyright; but if, previous to the filing, he had such intention, he is not within the protection of the statute. *Ib.*
5. SLIGHT ALTERATIONS.—It is not necessary that the play should be identical, word for word; and the alteration of a portion of the language would not deprive the author of his rights. *Ib.*
6. CONSENT of the author to publication abroad places him in the position of a foreign author, and is an abandonment of his rights under our statute. *Ib.*
7. REPRESENTATION NOT PUBLICATION.—By publication is meant publication *in print*. Representation upon the stage, by or with the consent of the author, is not "publication." *Ib.*
8. COMMON LAW RIGHTS of authors run only to publication. Thereafter their sole protection is the statute. *Ib.*
9. For infringement on unpublished plays, there is no limit as to damages. *Ib.*
10. COPY BEFORE PUBLICATION.—An author, or his assignees, have, before publication, an exclusive right to control the use of his literary productions. *Crowe v. Aiken*, 208.
11. REPRESENTATION of a play upon the stage is not, at common law, a publication. *Ib.*
12. STATUTE OF VICTORIA.—The English statute of 5 and 6 Victoria, chap. 45, sec. 20, which makes representation there a publication, cannot be so extended as to effect the exclusive proprietary rights of the author, or his assignees, at common law in the United States. It affects only proceedings had under the statute itself. *Ib.*
13. REPRESENTATION NOT DEDICATION.—The mere representation of a play does not dedicate it to the public, except so far as those who witness its performance can recollect it, nor have spectators the right to secure its reproduction by phonographic or other means independent of memory. *Ib.*
14. UNAUTHORIZED PERFORMANCE of a play which has been represented on the stage will not be presumed to be the result of memorizing it by a spectator, but the proof of this must be so clear as to negative any other conclusion. *Ib.*
15. NO RESTRICTIVE NOTICE is necessary to spectators to secure the author's rights, nor will such notice give him a right which he has not at common law. *Ib.*
16. The author's rights at common law have not been taken away or limited by any existing act of congress. *Ib.*

COUNTY BONDS.—*See* MUNICIPAL BONDS.

CRIMINAL LAW.

1. WHEN COURT MAY PRESCRIBE PLACE OF PUNISHMENT.—Unless the law of Congress prescribes in what particular place the punishment of an offense shall be executed, the district court has the power to designate any place within its jurisdiction, and, subject to this qualification; the acts of Congress of March 3, 1825, June 30, 1834, and

CRIMINAL LAW—*Continued.*

March 3, 1865, so far as they refer to the place of imprisonment, are merely declaratory. *Ex parte Geary*, 485.

2. HARD LABOR IN PENITENTIARY.—As by the laws of Illinois the prisoners in the state penitentiary are subject to hard labor, unless it is otherwise directed in their sentence, and the act of June 30, 1834, provides that criminals sentenced by the United States courts shall be subject to the same discipline and treatment as convicts sentenced by the state courts, it follows as a conclusion of law that the former are subject to hard labor as a part of the imprisonment. It is not necessary, in order to clothe the court with authority to imprison in the penitentiary, that a part of the punishment, by the terms of the sentence, should be hard labor. *Ib.*

3. OFFENDER CANNOT OBJECT THAT STATE IS NOT AUTHORIZED TO RECEIVE HIM.—The State would have the right to refuse the use of its penitentiary to the prisoners of the United States, but where for more than thirty years prisoners convicted in the courts of the United States have been sentenced to the penitentiary, and have been there received and kept, with the knowledge and acquiescence of the state authorities, and their expenses paid by the United States, it is not competent for an offender sentenced to the penitentiary by the federal court, to object that there is no express legislation by the state authorizing such prisoners to be there confined; such objection could only be made by the state. *Ib.*

4. TERM MAY BE DIVIDED.—The district court does not exceed its power in fixing a part of the term of imprisonment in the county jail, and the remainder in the penitentiary. *Ib.*

5. The usual practice on conviction is for the court to direct the marshal to take the prisoner to the penitentiary within a certain number of days, a sentence which when the prisoner is already in jail, is essentially the same. *Ib.*

6. The fact that the prisoner is retained for a time either before or after sentence, in the county jail, does not, in either case, authorize a writ of *habeas corpus*. *Ib.*

DAMAGES.—*See* MEASURE OF DAMAGES.

DANGERS OF NAVIGATION.—*See* ADMIRALTY.

DEED.—*See* REAL ESTATE.

DEDICATION.

1. DEDICATION BY GOVERNMENT.—The making and recording by a proper government agent of a plat of land belonging to the United States, a portion of which was designated as "public ground forever to remain vacant of buildings," with a memorandum added to the plat declaring that this portion "is not to be occupied with buildings of any description," is a dedication of such portion to public use of the kind and character mentioned in the plat. ***United States v. Illinois Central R. R. Co.*** 174.

DEDICATION—*Continued.*

2. COMMON LAW DEDICATION.—All the provisions of the state law not having been complied with, it was not a statutory but a common law dedication; the fee did not vest in the city under it. *Ib.*
3. GENERAL AND SPECIAL DEDICATION.—A distinction can be taken between a general and a special dedication, and in this case the fee remained in the United States, which still retain control over it so far as is consistent with the purposes for which it was specially dedicated, and no further. *Ib.*
4. CANNOT BE DIVERTED.—Property having been specially dedicated to a particular purpose, neither the state nor the municipality has the right to divert it from that purpose, except under the right of eminent domain. *Ib.*
5. EMINENT DOMAIN.—This right cannot be granted; it can be exercised only by the courts and by the legislature. *Ib.*
6. MANNER OF CONDEMNATION.—The legislature cannot take land from the owner and give it to a corporation, even for a public purpose; it must proceed in conformity to the law, and the compensation must be judicially ascertained, and cannot be fixed by statute. *Ib.*
7. The United States has such an interest in land that it can appeal to a court of equity. *Ib.*

DISTILLERS.—*See* REVENUE LAWS, 7-27.

DISTRESS WARRANT.

1. Issued by a government officer is due process of law, and seizure of property under it is within the taxing power of the Government. *Mason v. Rollins*, 99.
2. PRIORITY OF DISTRESS WARRANT—WARRANT IS MESNE PROCESS.—Under the statute of Illinois the levy of a distress warrant is in the nature of an attachment under *mesne* process, and is within the 14th section of the Bankrupt Act. *In re Joslyn*, 235.
3. CERTIFICATE IS FINAL PROCESS.—The certificate granted by the court is in the nature of *final* process, and if issued before the commencement of the proceedings in bankruptcy gives the landlord a perfected lien and priority over general creditors. *Ib.*
4. LEVY OF WARRANT GIVES NO PRIORITY.—Even though the landlord has levied his distress warrant, neither the common law nor the statute gives him a priority, if the petition in bankruptcy has been filed before certification by the court of the amount of rent due; but he must prove his claim with the general creditors. *Ib*

DISTRIBUTION OF PROCEEDS.—*See* ADMIRALTY, 25-30.

DOMESTIC VESSELS.—*See* ADMIRALTY.

ELECTION.—*See* MUNICIPAL BONDS.

EMINENT DOMAIN.—*See* DEDICATION.

EQUITY.—*See* CHANCERY.

EJECTMENT.

1. By Assignee of Mortgage.—To enable the assignee of a mortgage to recover in ejectment the possession of the mortgaged premises, he must show a conveyance or grant to himself of the estate which he seeks to recover. *Cottrell v. Adams*, 351.
2. The assignment of a note and mortgage, with authority to the assignee to foreclose, does not transfer the legal estate nor enable the assignee to maintain ejectment. *Ib.*

EVIDENCE.—*See* Mortgage, 12.

1. Under an indictment under the act of 1866, the government, claiming that a distiller must have used more material and manufactured more spirits than he returned, is bound to prove that such was necessarily the fact, and must exclude any other conclusion. *United States v. Furlong*, 97.
2. To sustain the theory that a given amount of material will produce a certain quantity of spirits, it must be shown that this is a necessary and unavoidable inference from the facts proved. *Ib.*
3. The carrier, in order to avail himself of the exceptions in a bill of lading of "dangers of navigation," must show due diligence and proper care to avoid the accident, and that it was unavoidable. *The Mollie Mohler*, 505.
4. The burden of proof for this purpose is upon the carrier. *Ib.*
5. Exclusion of Evidence.—Where, on the objection of a party, competent evidence has been excluded, he cannot urge that as error on motion for a new trial. *Whiton v. C. & N. W. Ry. Co.*, 282.
6. Recitals in Decree.—The recital in a decree of foreclosure that a defendant had been duly served with process is, after the lapse of time, conclusive, unless there is something in the record itself, showing that such recital is not or could not be true. *Riggs v. Collins*, 268.
7. Proof outside of the record is not admissible to contradict it, where that proof would affect the rights of third persons acquired under the decree of the court. *Ib.*

EXECUTOR.—*See* Jurisdiction, 11–18.

EXECUTION CREDITOR.—*See* Bankruptcy, 2–4, 9–11, 38–40.

EXEMPT PROPERTY.—*See* Bankruptcy, 71–81

FEES OF OFFICER.—*See* Bankruptcy, 74.

FORECLOSURE.—*See* Chancery, 10.

FORFEITURE.—*See* Revenue Laws, 28–30.

FRAUD.—*See* Bankruptcy, 30.

FRAUDULENT CONVEYANCE.—*See* Bankruptcy, 26–28, 30.

1. Fraudulent Conveyance by Bankrupt.—An assignee in bankruptcy can maintain an action to recover property conveyed by the bankrupt with intent to defraud his creditors previous to the filing

FRAUDULENT CONVEYANCE—*Continued.*

of the petition; in such case he represents the rights of the creditors. *Bradshaw v. Klein*, 20.

2. Such action is not limited by the provisions of the 35th section, but only by the general statute of limitations. *Ib.*

GENERAL AVERAGE.—*See* ADMIRALTY, 58–60.

HABEAS CORPUS.—*See* CRIMINAL LAW, 6.

INDIANS.

1. RIGHTS OF INDIANS.—The Indians on the Oneida reservation have the right to cut and use the timber thereon, and to sell sufficient to support themselves and families. *United States v. Foster*, 377.
2. They must be treated as owners of the land, their ownership, however, being subject to the rights of sovereignty of the United States. *Ib.*
3. The power of the United States to sell this reservation commented upon. *Ib.*

INDICTMENT.—*See* PLEADING, 2–6.

INJUNCTION.—*See* CHANCERY, 1–6—PATENTS, 4—MUNICIPAL BONDS, 8

INSURANCE.

1. PREMIUM NOTE.—The bankruptcy of an insurance company is no defense to an action upon a note given for a premium. *Cary, assignee, v. Nagle*, 244.
2. Under an amendment to the charter of a mutual insurance company authorizing them to make insurance "for a specific rate of premium to be paid in cash in the same manner as insurance companies other than mutual insurance companies are accustomed to do," they may accept a note for the premium, and recover upon it. *Ib.*
3. Such a note merely extends the time for a payment which should have been made in cash, becomes a part of the capital of the company, and is recoverable as assets *Ib.*
4. WAIVER OF CLAUSE IN POLICY.—A local agent of an insurance company may bind the company to waiver of the clause in the policy requiring formal proof of loss and barring suits not brought in one year. Statements that the proofs were "all right," and that the company would pay, amount to such waiver. *Phœnix Ins. Co. v. Ide*, 333.
5. RECEIPT OF THE PREMIUM, by the agent, binds the company, though the agent convert it, and a policy is never actually issued. *Ib.*
6. REFORMATION OF POLICY.—A court of equity has power to reform and cancel an insurance policy issued by mistake for a greater length of time than was intended by the parties. *North American Ins. Co. v. Whipple*, 418.
7. Circumstances stated under which a policy will be cancelled even after a loss has occurred. *Ib.*

INTEREST.—*See* USURY.

INVENTION.—*See* PATENTS.

JETTISON.—*See* ADMIRALTY, 16–21.

JUDGMENT CREDITOR.—*See* BANKRUPTCY, 2–4, 9–11, 38–40.

JURISDICTION.—*See* CRIMINAL LAW.

1. NON-RESIDENT CO-DEFENDANTS DO NOT OUST JURISDICTION.—Where in a case removed from a state court, all the defendants, except some who were residents of the state in which the suit was brought, had confessed the bill, the fact that some of the co-defendants were residents of another state does not prevent this court from taking jurisdiction. *Akerly v. Vilas*, 110.
2. CITIZENSHIP.—The assignee of a promissory note (being otherwise competent) may maintain an action upon it if the assignor might have done so at the time of the commencement of the suit. *Chamberlain v. Eckert*, 126.
3. The payee, a resident of the same state with the maker at the time the note was given, but having removed therefrom, may maintain an action in this court. *Ib.*
4. The words in the 11th section of the judiciary act of 1789, "Unless a suit might have been prosecuted * * * * if no assignment had been made," refer to the time when the suit was commenced, not the time of the assignment. *Ib.*
5. It is not necessary that it should appear that the assignor could have brought suit upon it before assignment. *Thaxter v. Hatch*, 6 McLean, 68. Approved. *Ib.*
6. *It seems* that if the payee, after the maturity of the note, and before suit brought, had become a citizen of the same state, the federal courts could not sustain jurisdiction. *Ib.*
7. PETITION IN BANKRUPTCY BY SINGLE CREDITOR.—The district court will not take jurisdiction in bankruptcy on the petition of an only creditor, whose debt is secured on real estate. *In re Johann*, 139.
8. Such creditor, seeking to set aside a fraudulent conveyance, must follow his remedy by bill in the state court. *Ib.*
9. There is nothing to bring such a case within the scope or intent of the act. *Ib.*
10. ADMIRALTY JURISDICTION.—Under the decisions of the supreme court the admiralty jurisdiction of the district courts over all the navigable waters of the country must be considered as established. *Seven Coal Barges*, 297.
11. JURISDICTION OVER EXECUTOR.—An executor cannot be compelled to appear and answer in a state where he has not taken out letters testamentary, nor done any official act. *Security Ins. Co. v. Taylor*, 446.
12. His power and liability are local, and the fact that process is served upon him while within the jurisdiction of this court, does not make him amenable to its process in his representative capacity. *Ib.*
13. A *scire facias* in this court to bring in the executors of a Wisconsin estate, will be dismissed. *Ib.*

LACHES.—*See* PATENTS, 4.

LEX REI SITÆ AND LEX DOMICILII.—*See* BANKRUPTCY, 72–78.

LIBEL.—*See* ADMIRALTY.

LIEN OF EXECUTION.—*See* BANKRUPTCY, 2–4, 9–11, 38–40.

LIEN ON STOCK.—*See* BANKING.

LIGHTS.—*See* ADMIRALTY, 6–11, 14.

LIMITATION.—*See* BANKRUPTCY—CHANCERY, 7.

1. STATE LIMITATION.—To an action on the case for the infringement of a patent, no state statute of limitation can be pleaded in bar. *Read v. Miller*, 12.

LOOKOUT.—*See* ADMIRALTY, 12, 13, 33, 46.

MANDAMUS.

1. REMEDY BY MANDAMUS.—A writ of *mandamus* is the proper process against a board of supervisors, to compel the levy of a tax and payment of a judgment obtained against the county, in this court. *United States ex rel v. Supervisors of Lee Co.* 77.
2. Where the respondents make no return to the writ, or refuse to obey it, this court will issue an attachment. *Ib.*
3. JURISDICTION ON REMOVAL.—Where a suit in the U. S. circuit court has been removed to the circuit court in another circuit, the latter court has the same power over the parties which the first court would have otherwise had. *Ib.*
4. CONFLICT OF JURISDICTION.—To a writ of *mandamus* issuing from this court it is not a sufficient answer that the respondents had been enjoined by a state court from doing the act which the writ of *mandamus* commanded. *Ib.*
5. REMOVAL FROM STATE COURT.—The U. S. circuit court has no power to issue a writ of *mandamus* to compel the removal of a cause from a state court. *In re Cromie*, 160.
6. The act of July 27, 1866, made no change in this respect. *Ib.*
7. The statute seems to contemplate some judicial action on the part of the state court. *Ib.*
8. DUTY OF CITY AUTHORITIES.—They have no right to spend their income in defraying current expenses, leaving their bonds and other debts unpaid; but are bound to provide for and pay the latter, and on failure or refusal, this court will, by *mandamus*, compel them so to do. *United States ex rel v. City of Sterling*, 408.

MARITIME LIEN.—*See* ADMIRALTY, 22–30.

MARSHALLING OF ASSETS.—*See* ADMIRALTY, 26, 27; BANKRUPTCY, 85–90.

MASTER.—*See* ADMIRALTY.

MATERIAL MEN.—*See* ADMIRALTY, 29.

MEASURE OF DAMAGES.

1. For infringement on unpublished plays, there is no limit as to damages. *Boucicault v. Wood*, 34.
2. DEATH BY NEGLIGENCE.—Where, in an action against a railroad com-

MEASURE OF DAMAGES—*Continued.*

pany for death by negligence, the jury rendered a verdict for the highest sum allowed by statute, five thousand dollars, it being shown that the person killed was a superior woman—as wife, mother, and member of society—there is nothing in the amount of the verdict to authorize the court to interfere. *Whiton v. C. & N. W. Ry. Co.* 282.

MORTGAGE.—*See* BANKRUPTCY, 45–66.

1. ON VESSEL—RECORDING.—The meaning of the first section of the act of July 29, 1850, is that any mortgage upon a vessel, recorded as therein prescribed, shall take effect and be binding upon all parties. *The Grace Greenwood*, 131.
2. Such a mortgage properly recorded becomes a binding security, and material-men claiming liens under state laws are bound to respect it. *Ib.*
3. PRIORITY.—The mortgage being prior in point of time should be first paid in full from the proceeds. *Ib.*
4. A corporation organized under the Illinois statute of February 18, 1857, has the power to mortgage its property. *Gaytes, assignee, etc., v. Lewis*, 136.
5. This statute is independent of the act of February 10, 1849. *Ib.*
6. EJECTMENT BY ASSIGNEE OF MORTGAGE.—To enable the assignee of a mortgage to recover in ejectment the possession of the mortgaged premises, he must show a conveyance or grant to himself of the estate which he seeks to recover. *Cottrell v. Adams*, 351.
7. The assignment of a note and mortgage, with authority to the assignee to foreclose, does not transfer the legal estate nor enable the assignee to maintain ejectment. *Ib.*
8. ASSIGNEE CANNOT AVOID USURIOUS MORTGAGE.—The assignee in bankruptcy of one of two joint makers of a note and mortgage, cannot maintain a petition to declare the sureties void for usury. *Bromley, assignee, etc., v. Smith*, 511.
9. PRIVILEGE FOR BORROWER ALONE.—The assignee is not a borrower within the meaning of the statute of Wisconsin concerning usury, and the power to institute proceedings to obtain a forfeiture is a privilege conferred by the act upon the borrower. The assignee, to obtain relief, must tender the money actually borrowed. *Ib.*
10. There is not in the bankrupt act any grant of a power or right to institute proceedings by petition for the recovery of a statutory forfeiture not claimed by the bankrupt either before or after the proceedings in bankruptcy. *Ib.*
11. The assignee may require the creditor to prove his debt, reciting the security and setting forth the consideration, and contest the claim for any usurious surplus. *Ib.*
12. MORTGAGOR NOT COMPETENT WITNESS AGAINST EXECUTORS.—Although neither of the mortgagors united in the petition, nor were

MORTGAGE—*Continued.*

parties to the record, yet under the act of Congress of March 3, 1865, they are not competent witnesses against the executors of the opposite party, as to transactions with or statements made by the testator. *Ib.*

MUNICIPAL BONDS.

1. COUNTY BONDS — MEETING OF SUPERVISORS MUST BE REGULARLY CALLED.—Where the statute of a state prescribes the manner in which a special meeting of the board of supervisors of a county shall be called, a special meeting held without observing these requirements is not legal. *Goodgen v. Supervisors of Manitowoc Co.*, 328.
2. OTHERWISE NO AUTHORITY TO SUBSCRIBE FOR STOCK AND ISSUE BONDS.—A board thus convened has no authority to initiate a proceeding to subscribe for stock in a railroad company and issue bonds in payment therefor, and proceedings based upon the action of such a meeting will be enjoined. *Ib.*
3. TAX-PAYERS MAY ENJOIN.—Proceedings preparatory to issuing the bonds must as substantially comply with the law, as in levying a tax for the payment of the debt, although in suits brought on such bonds by innocent holders, the court rejects proof of errors in or about the election, or in issuing the bonds. Objections made by tax-payers before the bonds are issued, are in time. *Ib.*
4. The fact that the total revenue of a city is used in defraying its current expenses, does not constitute a legal or sufficient excuse for not paying its maturing indebtedness. *United States ex rel v. City of Sterling*, 408.
5. DUTY OF CITY AUTHORITIES.—They have no right to spend their income in this way, leaving their bonds and other debts unpaid; but are bound to provide for and pay the latter, and on failure or refusal, this court will, on *mandamus*, compel them to do so. *Ib.*
6. POWER TO COLLECT TAX.—A city, which, by its charter, has certain general powers of taxation, and by consent of a majority of its legal voters at a proper election, can levy and collect a further tax, cannot plead that they have not sufficient power to collect an adequate tax to pay their debts. Under such a charter the authorities should, from their ordinary revenue, discharge their legal indebtedness, and provide for their ordinary expenses by a further tax, according to their charter. *Ib.*

NAVIGATION.—*See* ADMIRALTY, COLLISION.

NEGLIGENCE.—*See* ADMIRALTY, 15, 16, 51, 55; RAILROADS, 1–6

NOTES AND BILLS.—*See* BANKRUPTCY, 89.

1. JURISDICTION — CITIZENSHIP. — The assignee of a promissory note (being otherwise competent) may maintain an action upon it if the assignor might have done so at the time of the commencement of the suit. *Chamberlain v. Eckert*, 126.

NOTES AND BILLS—*Continued.*

2. The payee, a resident of the same state with the maker at the time the note was given, but having removed therefrom, may maintain an action in this court. *Ib.*
3. The words in the 11th section of the judiciary act of 1789, "Unless a suit might have been prosecuted * * * * if no assignment had been made," refer to the time when the suit was commenced—not the time of the assignment. *Ib.*
4. It is not necessary that it should appear that the assignor could have brought suit upon it before assignment.
   Thaxter v. Hatch, 6 McLean 68, approved. *Ib.*
5. *It seems* that if the payee, after the maturity of the note, and before suit brought, had become a citizen of the same state, the federal courts could not sustain jurisdiction. *Ib.*
6. ALTERATION IN NOTE.—A *bona fide* holder of a promissory note, from which the place where it was payable has been erased by an unauthorized person, and without his knowledge, can recover against the maker. *Major v. Hansen*, 195.
7. The alteration is not material, and enlarges but does not limit the rights of the maker. *Ib.*

NOTICE.—*See* REAL ESTATE.

PARTNERSHIP.—*See* BANKRUPTCY, 85–90.

PATENTS.

1. PRIOR ADJUDICATION.—When there has been a prior adjudication in another court, in which the validity of a patent has been fully contested and sustained, the court will, upon a motion for a preliminary injunction, consider the validity of the patent as *prima facie* established. *Goodyear v. Honsinger*, 1.
2. DIVIDING PATENT.—Whether a patent for a process can be re-issued and divided into two patents, one for the process, and the other for the product produced by the process, *quære*. *Ib.*
3. It is always unfair to those who are licensed to use the particular article or method, under letters patent, to allow, by laches, others to use what the licencees alone have a right to use under their licences. *Ib.*
4. INJUNCTION NOT ALWAYS GRANTED ON VALID PATENT.—A court of equity, while it may be satisfied the patent is valid, does not feel inclined, where those claiming under the patent have been negligent in enforcing their rights, to interfere in all cases by an absolute peremptory injunction. *Ib.*
5. EFFECT OF ACTS OF ORIGINAL PATENTEE.—Those who hold under an extension are to be visited with the consequences of the acts of the owners of the original patent. They take the extension as it falls to them on the expiration of the patent, and are not to be reinstated in all the rights of the original patentee. *Ib.*
6. SHOULD ASSERT HIS RIGHTS.—Where a patentee has stood by for a

PATENTS—*Continued.*

series of years, and permitted, or not formally objected to the use of the article claimed under the letters patent, such conduct ought to be visited to some extent upon him. Courts of equity ought to demand of patentees reasonable dilligence in asserting their rights. *Ib.*

7. PRELIMINARY INJUNCTION—WHEN GRANTED.—The same rule obtains in patent cases as in other equitable cases; the granting of a preliminary injunction is a matter of judicial discretion, to be determined by the circumstances under which the case is presented. *Irwin v. Dane*, 442.
8. It is proper to grant an injunction where much more injury would or might result to the complainants from a refusal than to the defendants from granting it. *Ib.*
9. Where the defendants had very little invested, and no substantial damages would accrue to them, if enjoined, while they might seriously injure the complainant's business by competition, an injunction should be granted. *Ib.*
10. Although a patent case is not like a suit upon a trade-mark, yet the standing of the complainants in the market, and their relation to the trade, are matters of value, and may pertain so intimately to their patent as to be proper for consideration on a motion for a preliminary injunction. *Ib.*
11. INJUNCTION AGAINST INFRINGEMENT—WHEN GRANTED.—If the rights under the patent are clear, and the infringement by the defendant free from doubt, and particularly after use of the invention by the patentee for a considerable time without controversy, the modern practice is not to compel the plaintiff in the first instance to proceed at law. *Shelly v. Brannan*, 315.
12. Under such circumstances it is the general practice to apply to the equitable side of the court for relief, which in a proper case, is given without hesitation. *Ib.*
13. The patent never having been the subject of litigation, the complainant was ordered to file an injunction bond before the issue of the writ. *Ib.*
14. Griscom & Denn's patent for limekilns construed. *Ib.*
15. PRIORITY OF INVENTION—SIMILARITY.—A patent for improvement in a wagon reach, consisting of an upward curve, whereby, in turning, the forward wheels are allowed to pass under the reach, combined with an extension of the ordinary sway-bar, so arranged upon the hounds that it will still form a support for the reach, cannot be sustained when it is proved that a carriage fitted with a reach which had a bend allowing the wheels to pass partly under, and with a circular sway-bar or wheel by which the reach would be sustained in all positions, had been in use for several years. *Flood v. Hicks*, 169.
16. Increasing the curve in the reach, or diminishing the diameter of the wheel, would allow it to pass completely underneath, as in the plain-

PATENTS—*Continued.*

tiff's patent, and this is a change which would naturally suggest itself to any mechanic, and cannot be the subject of a valid patent when the substantial invention had been previously in use. *Ib.*

17. The circular sway-bar would have performed the same office as the plaintiff's improved extended sway-bar, had the wheel passed beneath the reach, and the plaintiff's patent for the curved reach having failed, his claim for the improved sway-bar must fail with it. *Ib.*
18. The name by which any structure or part is designated is immaterial. *Ib.*
19. When a man conceives a certain machine, no one knows except himself. When he describes it, no one knows but himself, and those to whom he describes it. This is, from the nature of the case, the testimony upon which reliance must be placed. *Sayles v. Hapgood*, 189.
20. Priority of conception, followed by a prior patent, gives priority of right. *Ib.*
21. Letters patent for an improvement in cultivators, granted to James Dundas, February 8, 1859, and re-issued, are void for want of novelty, the same invention having been conceived and a machine constructed by one Marsh, before the conception of the invention and the construction of the machine, respectively, by Dundas. *Ib.*
22. RIGHTS OF ASSIGNEE OF PATENT, AFTER RENEWAL.—The assignee of a patent holding at the expiration of the first term a right during that term to "make, construct, and use" the article patented, may, during the term of its subsequent extension, continue to use it, and even repair it, but is not entitled to make it for use, or for any other purpose. *Wood v. Michigan Southern R. R. Co.*, 62.
23. Section 18 of the act of July 4, 1836, construed. *Ib.*
24. Whether this doctrine applies to a process.—*Quære.* *Ib.*
25. STATE LIMITATION.—To an action on the case for the infringement of a patent, no state statute of limitation can be pleaded in bar. *Read v. Miller*, 12.
26. PLEADINGS.—Nor can the defendant plead the general issue with notice of special matters of defense, and also in a special plea set up the same matter in bar. *Ib.*
27. UNIFORMITY OF RULE IN PATENT CASES.—The policy of the national government in putting the whole subject matter of patents under the control of Congress and the United States courts, was evidently to provide a uniform rule concerning the same throughout the United States, that patentees might everywhere have the same rights and remedies. *Ib.*
28. CONSTITUTIONALITY OF STATE LAW.—The legislature of a state has no right to interfere with the enjoyment of property in inventions, or to annex conditions to the grant. *Ex parte Robinson*, 309.
29. If a patentee complies with the laws of Congress on the subject, he

PATENTS—*Continued.*

has a right to go into the market anywhere within the United States and sell his property. *Ib.*

30. A state law regulating the sale of patent rights is void. *Ib.*

31. VALIDITY OF RE-ISSUED PATENT.—In considering the validity of a re-issued patent the only question is as to whether the invention described in the re-issued letters is to be found in the original model, specifications or drawings of the invention. *Chicago Fruit House Co. v. Busch*, 472.

32. In the re-issued patent the patentee need not claim all that was claimed in the original patent, but may retain what he deems proper. *Ib.*

33. ACTION OF COMMISSIONER.—The court must accept the action of the commissioner of patents, as the lawful exercise of his authority, unless it is apparent upon the face of the patent that he has exceeded his authority, and there is a clear repugnancy between the old and the new patent. *Ib.*

34. PATENTEE MAY OMIT PART OF HIS CLAIM.—A patentee, the main and controlling element of whose invention was a metallic ice floor, may in a re-issued patent omit the specifications of the method and form of the supports which had formed a part of his original letters patent, without impairing his claim to the subject matter retained. *Ib.*

35. "AIR-TIGHT"—IMPERFECT CONSTRUCTION.—The term "air-tight," as applied to the floor of an ice reservoir, means substantially "water-tight," or such a construction of the floor that the water will not run down upon the articles stored below, nor the air escape to melt the ice above. A patent for such a floor cannot be evaded by constructing a leaky floor. A person cannot use a patented device by constructing it in an imperfect manner. *Ib.*

36. ADDING TO PATENTED ARTICLE.—The fact that in combination with the floor patented, the defendants use another floor, cannot be allowed as a defense. If the floor patented is any part of the defendants' combination, any additions or improvements made thereto do not entitle them to use the part patented. *Ib.*

37. RE-ISSUE—ONLY FOR ORIGINAL INVENTION.—A re-issue can only be for the invention originally made, and intended to be described or claimed, and included in the original patent. *Brown v. Selby*, 457.

38. EACH PART SHOULD STAND SEPARATELY.—It would seem to be sound principle, when, on a re-issue at the desire of the patentee, several patents are issued, under section 5 of the act of 1837, for distinct and separate parts of the thing patented, that each part covered by each patent should stand by itself as an invention. *Ib.*

39. IMPROVEMENTS.—Where the patentee is not the inventor of the original machine, but is a mere improver, his claims must be construed under the guidance of that leading fact. *Ib*

40. It is a fundamental rule that if a man merely improves a machine he

PATENTS—*Continued.*

should clearly disclose to the public in his specifications what is new in his invention. *Ib.*

41. Vague and sweeping claims of entire machines, where a patentee has only improved a part, ought not to be encouraged. *Ib.*

42. SEAT UPON PLANTER.—A claim for the form and location of a seat upon a machine might stand if there was any change or modification of the parts by which a seat was obtained, but only under special circumstances. If the claim be only for mounting the attendant in such a position that he may overlook the work, it cannot stand, unless the mode and manner of the position be pointed out, and is the subject of invention. *Ib.*

43. The claims of the ten re-issues of the patent issued to George W. Brown for "improvements in seed planters," in 1853 and 1855, examined, construed and limited. *Ib.*

44. Brown was not the inventor of the runner for seed or corn planters, nor the first to mount the attendant upon the machine. *Ib.*

PERILS OF THE SEA.—*See* ADMIRALTY, 56, 57.

PLEADING.—*See* REVENUE LAWS, 31–38.

1. To a suit on a promissory note, defendant pleaded in abatement the pendency of a suit in the state court; plaintiff replied that since the filing of the plea the suit had been dismissed.

Held: A good replication. *Chamberlain v. Eckert*, 124.

2. PARTICULARITY IN INDICTMENT.—In an indictment under sec. 44 of the bankrupt act, for obtaining goods on credit, with intent to defraud, the proceedings in the bankrupt court must be pleaded and proved with such particularity as to show affirmatively that an adjudication of bankruptcy was made upon a case in which the court had jurisdiction. *United States v. Prescott*, 325.

3. ITS REQUISITES.—The indictment, therefore, should set out the filing of the petition, the name of the petitioning creditor, the amount of his debt, the alleged act of bankruptcy, and the adjudication of the bankrupt court. *Ib.*

4. The description of the goods obtained, as "a large quantity of boots and shoes," is too uncertain. It should be as definite as would be required in a declaration in trover. *Ib.*

5. Offenses under sec. 44 are misdemeanors, and the word "feloniously" should not be used. *Ib.*

6. Dates should not be specified by figures in an indictment. *Ib.*

7. PROVISO IN STATUTE.—If an information sets forth a proper cause of forfeiture within the main part of a statute, the fact that it does not allege that the case is not within the proviso under which there was an exemption from forfeiture, does not prevent the operation of the statute. *The Mary Merritt*, 381.

8. MATTER OF DEFENSE.—If the claimant relies upon the exemption under the proviso, he must allege it. That is matter of defense to be set up by him. *Ib.*

PLEDGE.—*See* BANKRUPTCY 14–16.

POLICY.—*See* INSURANCE.

PRACTICE.

1. APPEAL BY ONE PARTY ONLY.—Where, in a collision case, the district court had found both parties in fault, and divided the loss, and the respondents only appealed, the libellants are bound by the decree as to the fault on their part, and the circuit court on appeal cannot inquire as to that point. The only subject of inquiry is whether the respondents were in fault. *The Quickstep*, 291.
2. STATE LAWS AND DECISIONS.—The established rule is that the federal courts are to administer the laws of the states in cases where they apply; and the uniform practice has been to consider a judicial interpretation placed upon a statute the same as if incorporated within the language of the statute itself. *Olcott v. Fond du Lac Co.* 368.
3. When the highest judicial tribunal of a state has placed a construction upon a statute of a state, that construction will be adopted by this court. *Ib.*
4. A REVISORY PETITION—To the circuit court, under the second section of the bankrupt act must show wherein the error in the order of ruling of the district court complained of consists, and its nature must be distinctly set forth. The case will not be taken up *de novo*. *In re Sutherland*, 405.
5. Proper practice stated. *Ib.*

PRINCIPAL AND AGENT.

1. COMMISSION MERCHANT—Is liable to his principal if he sells goods contrary to instructions, or is guilty of negligence in the sale. *Marshall v. Williams*, 255.
2. WAIVER.—The receiving without objection accounts of sales made on credit, is a waiver of a previous instruction to sell for cash, and the merchant may afterwards presume that he has the right to make further sales on credit. *Ib.*

PRIOR ADJUDICATION.—*See Res Judicata.*

PUBLICATION.—*See* COPYRIGHT.

PURCHASER.—*See* VENDOR AND VENDEE.

RAILROADS.

1. NEGLIGENCE IN CROSSING TRACK.—Where three persons, having waited for a freight train to pass, at the crossing of a frequented street, then cross the track, and two of them are struck by a switch train on an adjoining track and killed, there being at the time a strong wind blowing, the bell on the switch train not having been rung, and the survivor having neither seen nor heard the switch train until after the accident, the circumstances are not such as to warrant the court in instructing the jury in an action brought by the representative of one of the deceased persons that the plaintiff could not recover. *Whiton v. Chicago & Northwestern R. R. Co.*, 282.
2. NOT EXCUSED BY SPEED OF TRAIN.—Although the freight train was

RAILROADS—*Continued.*

running at a higher speed than allowed by law, and probably if it had not been passing, the accident would not have occurred, nevertheless the only effect of the passing of that train was to modify or influence the conduct of the others, and the fault of the freight train is too remote in law to constitute one of the causes of the accident. *Ib.*

3. This court is, however, not prepared to say that every person who, in a populous town, at a railroad crossing, fails to pause and look up and down the track, is guilty of such negligence as to prevent a recovery for an injury inflicted by the flagrant wrong of those in charge of a passing train. *Ib.*
4. RINGING BELL.—The bell should be rung not only before crossing a street, but so long as there is danger of encountering passers-by. *Ib.*
5. CONTRIBUTORY NEGLIGENCE.—The courts are much influenced by the conduct of the defendant, and, if the wrong is flagrant, are inclined to hold that to be the cause of the injury.
6. WHO TO JUDGE OF NEGLIGENCE.—While there are some things as to which it might be the duty of the court to charge that they constitute negligence, there are many others which the court must leave to the jury to decide. The court properly charged the jury that if the bell of the switch train was not rung, that was negligence, and left it to them to decide whether the person injured had been negligent. *Ib.*
7. EXCLUSION OF EVIDENCE.—Where, on the objection of a party, competent evidence has been excluded, he cannot urge that as error on motion for a new trial. *Ib.*
8. MEASURE OF DAMAGES.—Where the jury rendered a verdict for the highest sum allowed by statute, five thousand dollars, it being shown that the person killed was a superior woman—as wife, mother, and member of society—there is nothing in the amount of the verdict to authorize the court to interfere. *Ib.*
9. FORECLOSURE AGAINST RAILROAD COMPANY.—Where a bill had been filed in this court to foreclose a mortgage given by a railroad company, various interlocutory orders entered, a trustee appointed who had taken possession of the road, and on the faith of these orders certain bonds had been surrendered, stocks taken, and debts and liabilities incurred, this is the proper tribunal to decide the rights and equities of the parties in interest.—*Bill v. New Albany, etc. R. R. Co.*, 390.
10. TRUSTEE SHOULD REPORT TO THIS COURT, and any of the parties have the right to insist upon such report. He has no right to turn over to another jurisdiction matters which had been partially adjudicated here, and this is the only court whose decision upon the rights involved here is binding on the parties. *Ib.*
11. When a party in interest in such case asks for relief, it is no answer

RAILROADS—*Continued.*

to say that another jurisdiction has attempted to seize the property, and thus place it beyond the power of this court to give relief. *Ib.*

12. INTERFERENCE BY STATE COURT.—Where during the pendancy of the suit in this court, the trustee, acting with certain bondholders, but without notice to or permission from this court, filed a bill in the state court to foreclose the same mortgages which are the subject of this bill, and making no reference to the case in this court, upon which a receiver was appointed, foreclosure ordered, and sale made by the sheriff, who, under order of the court, delivered the road to the purchasers; such an interference on the part of the state court with property at the time within the jurisdiction of this court, was unauthorized, and it is nevertheless within the control of this court to adjudicate upon the equitable rights of all who have ever been before it. *Ib.*
13. A bondholder and stockholder is entitled, in such a case, to the equitable interposition of this court to protect his rights under its decrees and to demand an account from the trustee or his representatives. *Ib.*
14. The purchasers and their counsel, having had notice of what had occurred in this court, cannot claim to be *bona fide* purchasers. *Ib.*
15. RECEIVER—WHEN APPOINTED.—The company being insolvent, the original trustee having died without rendering a proper account to this court, and the road being in the actual possession of parties acting in hostility to its decrees, a receiver should be appointed. *Ib.*

RATE OF SPEED.—*See* ADMIRALTY, 37, 39, 41. RAILROADS, 2.

REAL ESTATE.

1. MISDESCRIPTION IN DEED—NOTICE.—A deed filed for record, misdescribing the premises—the numbers of the township and range having been transposed, but there being in the county no premises corresponding to the description in the deed—is sufficient notice to put a purchaser upon inquiry, and charge him with knowledge that the premises had been conveyed. *Partridge v. Smith*, 183.
2. The misdescription is not of such a character as to do away with the effect of the registry laws. *Ib.*
3. A mortgagee of real estate is a *bona fide* purchaser, even though the mortgage was given to secure a pre-existing debt. *Ib.*
4. LIMITATION—LACHES.—A bill in equity cannot be maintained upon a bond for the conveyance of real estate executed and delivered more than twenty years previously, the obligor having soon afterwards repudiated its obligation, and thenceforth treated the land as his own, and the complainant having in the meantime made no effort to enforce his rights. *Wright v. Fullerton*, 836.
5. The fact that he considered the bond worthless, did not suppose that he could collect anything from the defendant, and was not aware that he had any rights under it until advised by counsel, do not form a sufficient excuse for his laches. *Ib.*

RECEIVER.—*See* CHANCERY, 16.

RECITALS.—*See* EVIDENCE, 6.

RECORDING.—*See* MORTGAGE, 1–3. REAL ESTATE.

REMOTE DAMAGES.—*See* ADMIRALTY, 67. RAILROADS, 2.

The libellant had left his tug and taken refuge in another at the time of a collision, and was injured in regaining his tug. *Held:* The collision was the remote—not the proximate—cause of the injuries to libellant, and he cannot recover. *The Tug Union*, 18.

REMOVAL FROM STATE COURT.

1. Where the application for the removal of a cause from the state to the United States courts is in proper form, and the facts upon which the application is founded are made to appear according to the requirements of the act, the party is entitled to have the cause removed, and the judge of the state court has no discretion. *Akerly v. Vilas*, 110.
2. REFUSAL OF CLERK TO FURNISH COPIES.—Where the clerk of the state court had, on proper application, refused to furnish a certified copy of the record and proceedings, this court will allow the parties to supply them. *Ib.*
3. NON-RESIDENT CO-DEFENDANTS DO NOT OUST JURISDICTION. Where in the state court all the defendants, except some who were residents of the state in which the suit was brought, had confessed the bill, the fact that some of the co-defendants were residents of another state does not prevent this court from taking jurisdiction. *Ib.*
4. APPLICATION—WHEN IN TIME.—An application for removal, made after the state supreme court had remanded the cause to the state circuit court, is made "before the final hearing or trial," and is in time. An order of the state supreme court, reversing the judgment of the circuit court, and remanding the cause for further proceedings, opens the case to litigation, as if no judgment had ever been rendered. *Ib.*
5. The United States circuit court has no power to issue a writ of *mandamus* to compel the removal of a cause from a state court. *In re Cromie*, 160.
6. The act of July 27th, 1866, made no change in this respect. *Ib.*
7. The statute seems to contemplate some judicial action on the part of the state court. *Ib.*

RENEWAL.—*See* PATENT, 22, 31–33, 37.

RES JUDICATA.

PRIOR ADJUDICATION.—When there has been a prior adjudication in another court, in which the validity of a patent has been fully contested and sustained, the court will, upon a motion for a preliminary injunction, consider the validity of the patent as *prima facie* established. *Goodyear v. Honsinger*, 1.

REVENUE LAWS.

CONSTITUTIONALITY OF LAW ON DISTILLERIES.—The act of July 20, 1868, regarding distilleries, is constitutional. *Mason v. Rollins*, 99.

2. POWER OF CONGRESS.—The power vested in Congress by the constitution to levy and collect taxes, duties, imposts and excise, with the authority to make all laws necessary and proper to carry that power into effect, is absolute, with the single restriction that no rights secured by other provisions of the constitution shall be violated. *Ib.*

3. Congress having the power to impose a tax, and to render its collection effectual, if the character of the business is such that the giving of a bond as a condition precedent to commencing business is a proper means of insuring its collection, such a bond may be required. *Ib.*

4. REGULATING DISTILLERY.—The prohibition of a distillery within 600 feet of a rectifying establishment is not an unwarrantable interference with the use and disposition of property. If a business affords unusual facilities for evading the government tax, then Congress may prescribe the modes, conditions and limitations under which that busidess can be transacted. *Ib.*

5. DISTRESS WARRANT.—Issued by a government officer is due process of law, and seizure of property under it is within the taxing power of Government. *Ib.*

6. RESTRAINING GOVERNMENT OFFICERS.—Although it might be the duty of a court to interfere with the execution of a law imposing unreasonable conditions to the pursuit of a lawful business, yet it will not restrain the officers of the Government from carrying out a law, on the application of a party who simply fears that he may be injured in a business which he proposes to undertake. He must first be pursuing his lawful business, and some unauthorized act be done or threatened. *Ib.*

7. DISTILLER'S BONDS.—The claim of the Government under distillers' bonds for the payment of a tax, is not a penalty, nor in the nature of a penalty. *United States v. Dutcher*, 51.

8. A bond given under the act of July 13, 1866, is not a penalty, but a contract and security, and is not affected by the repealing act of January 11, 1868, nor are suits or prosecutions instituted upon such a bond abated. *Ib.*

9. A distiller cannot avail himself of any mistake of the officer in overgauging the spirits. The law is imperative. *Ib.*

10. The tax must be paid at the rate prescribed by the law in force at the time the bonds were given. *Ib.*

11. BONDS.—When a distiller has given the bond required by the 7th section of the act of July 20, 1868, in regard to excise duties, which bond has been approved by the assessor, the neglect to file the plans and descriptions prescribed in the 9th section does not bring him within the penalty of the 7th section for failure to give the bond required by law. *United States v. Thirty-five Barrels of Highwines*, 88.

REVENUE LAWS—*Continued.*

12. It was the duty of the assessor to see that the preliminary things were done, and, after he had passed upon the bond, the distiller was justified in proceeding upon the belief that the requirements of the statute had been complied with. *Ib.*
13. FORM OF BOND.—Under the clause requiring that he should "make and execute a bond in form prescribed by the commissioner of Internal Revenue," until a form had been prescribed, it was sufficient for him to give a bond in the form and with the condition contained in the statute. *Ib.*
14. BOOKS—INTENT.—Under the 19th section, directing the keeping of books, etc., the distiller is bound, even though the commissioner has prescribed nothing as to form, to keep books showing the facts prescribed by the statute; but, to bring him under the penalty, the failure or omission to keep books and make the proper entries must be *with intent to defraud*—which intent the prosecution must establish affirmatively. *Ib.*
15. For the payment of the tax prescribed in the 59th section is not a condition precedent to commencing business, and the penalty is not incurred until after assessment, demand and refusal. *Ib.*
16. BONDS AND TAXES.—The 20th section of the act of July 20, 1868, cannot be construed as authorizing the collection of a tax on spirits which have never been actually produced. *United States v. Singer*, 226.
17. A distiller is not bound to return more spirits than he has produced. If his return is less than eighty per cent. of the producing capacity of the distillery, the assessor should assess him for the deficiency, but to the claim for a tax on such alleged deficiency, the fact that such deficiency does not exist is a sufficient answer. *Ib.*
18. SURETIES.—The sureties on distillers' bonds, executed previous to the act of March 29, 1868, are not liable to reimburse the United States the expenses and salaries charged against distillers in said act. *Ib.*
19. Sureties are not liable for the performance by their principal of duties not within the scope of the particular office, and which they cannot be supposed to have contemplated at the time they executed the bond. *Ib.*
20. DISTILLER'S TRANSPORTATION BOND.—To a suit upon a bond for the transportation of highwines, it is a sufficient defense that during the act of transportation the officers of the Government seized them, and that the collector of the district to which they were consigned refuses to grant a certificate of delivery to him. *United States v. Stewart*, 412.
21. ESTOPPEL.—The Government having by its own act prevented the performance of the condition of the bond, is estopped from recovering upon such a breach. *Ib.*
22. The fact that the seizure was made by reason of the wrongful act of the persons having the highwines in charge makes no difference. The Government had the election to seize them in transit, or await

REVENUE LAWS—*Continued.*

their delivery; but if it does the former, it cannot afterwards sue for the breach of the bond. *Ib.*

23. To a plea setting up the above facts it is not a good replication that the seizure was properly made for a violation of the internal revenue laws, for which the wines were afterwards duly forfeited in the district court. *Ib.*

24. A certain percentage of alcohol being produced in the manufacture of vinegar, such manufacture is within the prohibition of the 4th section of the act of July 20th, 1868. *United States v. Prussing*, 344.

25. Any mash, wort, or wash, from which alcohol might be separated by distillation, is "fit for distillation," even though such distillation might not be profitable, and the alcohol is never released from its impure state, but kept down by a sour ferment. *Ib.*

26. The intent of the act is to require all the alcohol used in any of the manufactures of the country to be so separated that the tax can be assessed and collected thereon. *Ib.*

27. Congress has the power to compel all parties using alcohol to use tax-paid spirit, instead of generating it within the mass where it is to be subsequently used. *Ib.*

28. FORFEITURE UNDER REVENUE LAWS.—Goods landed without a permit from the proper collector and naval officer, if any, are subject to forfeiture to the United States. *United States v. Twenty Cases of Matches*, 47.

29. It is no defense that the unlading was without the knowledge or consent of the owner or consignee; that it was at an intermediate port, and not at the port of destination; and that it was an unlawful act on the part of the master. The forfeiture attaches upon the unlawful unlading, wherever that may be. *Ib.*

30. The facts that these goods were the production of the United States, and simply transported through a foreign country, and were exempt from duty, and that all the laws and regulations relating to such transit had been strictly complied with, does not remove the necessity of procuring a permit. *Ib.*

31. The information is well brought under the 50th section of the act of 2d March, 1799. *Ib.*

32. To an information against a brewer, filed under the 48th, 49th, 51st, and 53d sections of the act of July 13, 1866, it is not a sufficient answer that the neglect to keep the prescribed books and accounts was through ignorance or carelessness, and that there was no wrongful or criminal intent. *United States v. Foster*, 453.

33. The object of the law is to protect the Government in the collection of the tax. The penalty is for the omission, and the very nature of this business demanded that the brewer should know his duty in the premises. *Ib.*

34. Nor is it a sufficient answer or excuse that he misconstrued the law, and drew erroneous inferences as to his rights. *Ib*

REVENUE LAWS—*Continued.*

35. Where the law prescribes as punishment for an offense both a money penalty and imprisonment, it is not true that the penalty can only be enforced by indictment. The Government can maintain an action of debt for the money penalty. *Ib.*
36. The words "shall be liable to," etc., are permissive, and not compulsory; they mark the extreme limit of the penalty, and leave it discretionary whether the whole penalty shall be imposed. *Ib.*
37. Under an indictment under the act of 1866, the Government, claiming that a distiller must have used more material and manufactured more spirits than he returned, is bound to prove that such was necessarily the fact, and must exclude any other conclusion. *United States v. Furlong*, 97.
38. To sustain the theory that a given amount of material will produce a certain quantity of spirits, it must be shown that this is a necessary and unavoidable inference from the facts proved. *Ib.*

REVIEW.—*See* BANKRUPTCY, 106–107.

SALVAGE.

1. SALVAGE being a branch of admiralty jurisdiction, the district court has the same jurisdiction over a case of salvage on the Ohio river as on the Hudson. *Seven Coal Barges*, 297.
2. WHAT CONSTITUTES.—It is sufficient that the property be exposed to a chance which might destroy it, and that the labor, at some personal risk; substantially contributes to the salvage. *Ib.*
3. The fact that the owner is in pursuit, unknown to the salvor, does not deprive him of his claim. *Ib.*
4. Barges adrift on the Ohio river are a proper subject of salvage. *Ib.*

SEAMEN.—*See* ADMIRALTY.

SIGNALS.—*See* ADMIRALTY, 40, 43, 49, 50. RAILROADS, 4.

SIGNAL LIGHTS.—*See* ADMIRALTY, 9–15, 31–34.

STATUTES OF THE UNITED STATES.

The following, among others, commented on and construed:

Judiciary act of 1789 *Chamberlain v. Eckert*, 126.
March 2d, 1799. *United States v. Twenty Cases of Matches*, 47.
March 3d, 1825. *Ex parte Geary*, 485.
June 30th, 1834. *Ex parte Geary*, 485.
July 4th, 1836. *Wood v. Michigan Southern, etc. R. R. Co.*, 62
July 20th, 1840. *The City of Fremont*, 415.
July 29th, 1850. *The Skylark*, 251.
April 29th, 1864. *The Empire State*, 216.
June 3d, 1864. *Evansville Nat. Bank v. Metropolitan Nat. Bank*, 527
March 3d, 1865. *Ex parte Geary*, 485. *Bromley, assignee, v. Smith*, 511
July 13th, 1866. *United States v. Dutcher*, 51.
July 27th, 1866. *In re Cromie*, 160.
March 2d, 1867. *Ex parte Geary*, 485.
March 29, 1869. *United States v. Singer*, 226.

STOCKHOLDERS.

1. LIABILITY.—It is the duty of a shareholder in a company to examine his certificate, and ascertain his actual position and liability. *National Park Bank v. Nichols*, 146.
2. Circumstances which make a shareholder liable for previously contracted debts, and effect of misrepresentations by agent. *Ib.*
3. FRAUD WAIVED.—Though a subscription be obtained by fraud, the stockholder may waive it by assuming its advantages. *Ib.*
4. ESTOPPEL.—If a shareholder assumes the benefits and advantages of a partner, he cannot, when called upon to respond for the contracts of the corporations, deny his liability. *Ib.*
5. BANK'S LIEN ON STOCK.—A transfer of stock in a banking corporation, organized under the act of June 3d, 1864, to a *bona fide* holder is valid, though the seller or pledgor be at the time indebted to the bank, and a by-law of the bank declared that no transfer of the stock by any shareholder indebted to the bank should be made without the consent of the board of directors. *Evansville National Bank v. Metropolitan National Bank*, 527.
6. Such a by-law in effect attempts to create a lien upon stock for debts of the holder, and the result is the same as if a loan were made upon the security of the stock — a transaction forbidden by the 35th section of the act. *Ib.*
7. The principle announced in the case of the *First National Bank of South Bend v. Lanier* is decisive of this case. *Ib.*

SUPERVISORS.—*See* MUNICIPAL BONDS.

TORT.

1. JUDGMENT FOR TORT—is discharged under the bankrupt law. *In re Wiggers*, 71.
2. RELEASE FROM ARREST.—A bankrupt arrested under a *ca. sa.* issued upon such a judgment will be released by this court, even though the state court had refused to do so. *Ib.*

TOW, DUTIES OF.—*See* ADMIRALTY, 34, 39, 45–47, 54–56.

TUG.—*See* ADMIRALTY, 36, 41, 45–47.

USURY.—*See* BANKRUPTCY, 62–65.

VENDOR AND VENDEE.

1. PURCHASE BY SAMPLE.—A purchaser on a warranty by sample is not bound to receive goods which do not correspond with the sample, and can recover the money paid for the same. *Conrad v. Dater*, 342.
2. The fact that he has received the goods and paid the freight on them does not estop him, if he had no previous opportunity to examine them and ascertain their quality. By immediately notifying the vendor that he refuses to accept the goods, he becomes entitled to a return of the money paid. *Ib.*
3. He can also recover the freight money, on the ground that it was paid before he had an opportunity of knowing whether the article delivered was of the quality represented. *Ib.*

VENDOR AND VENDEE—*Continued.*

4. Such a contract of purchase is executory, and there is no legal way by which a man can be compelled to accept that which he had not agreed to buy. *Ib.*
5. He is not bound to receive the goods and then sue the vendor upon his warranty. *Ib.*

WAIVER.—*See* PRINCIPAL AND AGENT, 2—INSURANCE, 4.

WESTERN LAKES AND RIVERS.—*See* ADMIRALTY.

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